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No. 77-1465

In the Supreme Court of the United States

OCTOBER TERM, 1977

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GENEVIEVE O. RASMUSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

GENEVIEVE O. RASMUSSEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A-14A) is reported at 567 F. 2d 1385. The opinion of the Benefits Review Board (App. B, *infra*, pp. 15A-25A) is reported at 1 BRBS 378. The decision of the administrative law judge (App. C, *infra*, pp. 27A-74A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the weekly rate of death benefits under the amended Longshoremen's and Harbor Workers' Compensation Act is subject to the same maximum limitations as apply to benefits payable to a totally disabled worker.[1]

STATUTES INVOLVED

1. Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. (1970 ed.) 906(b):

> Compensation for disability shall not exceed

[1] There is perhaps also a threshold question whether the Director of the Office of Workers' Compensation Programs had standing to seek review of the Benefit Review Board's decision and now has standing to file the present petition for certiorari. Although the matter was left open in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n. 11, it may be that the Director's standing is now settled by this Court's action in granting his petition for certiorari, unsupported by private parties, in *Director, Office of Workers' Compensation Programs, U.S. Department of Labor* v. *Jacksonville Shipyards, Inc., et al.*, 433 U.S. 904. At all events, the question was not raised below or addressed by the court of appeals and is unlikely to be raised here, since, as we are advised, the other respondents will also be filing petitions for certiorari. Nevertheless, should this Court wish the issue briefed, we shall, of course, stand ready to do so.

> $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That, if the employee's average weekly wages, as computed under section 10, are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. (1970 ed.) 909:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> * * * * *
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess

of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Section 6(b), (d), 33 U.S.C. (Supp. V) 906(b), (d):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1975.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. (Supp. V) 909:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other

than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

STATEMENT

Respondents are the widow and child of Dr. William C. Rasmussen, a hydrologist who was killed on May 11, 1973, by a land-mine explosion in the course of his work in Vietnam for Geo Control, Inc. His employment was within the coverage of the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. 1651 *et seq.*, one of the several statutory extensions of the Longshoremen's and Harbor Workers' Compensation Act. When respondents claimed death benefits under the Longshoremen's Act, Geo Control and its workers' compensation insurer, New Hampshire Insurance Co., agreed that benefits were payable, but disputed the weekly rate claimed by the beneficiaries—two-thirds of Dr. Rasmussen's average weekly wages of $798, or $532 a week. The employer and insurer contended that the limitations of Section 6(b)(1) of the Longshoremen's Act, 33 U.S.C. (Supp. V) 906(b)(1)—initially $167 a week, and now $367.22 a week—were applicable to death benefits in the same manner as to benefits for permanent total disability.

The question of the applicability of the Section 6(b)(1) limitations to death benefits was initially litigated before the Deputy Commissioner for the Fifteenth Compensation District of the Department of Labor's Office of Workers' Compensation Programs (OWCP).[2] That was the first occasion to de-

[2] See 20 C.F.R. 701.201–701.203, 701.301(5)–(7), 702.101, 704.101(d).

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velop an administrative construction of the amended provisions, and it was ruled that death cases were not exempt from the limitations announced in Section 6(b)(1), but, on the contrary, that Section 6(d) made those limitations applicable with only this difference: during the "transition" period, the ceiling would not be frozen by the limit in effect at the time of death, but would be adjusted upwards, as time passed, in accordance with the new limit prescribed for each period.

The beneficiaries appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the Longshoremen's Act (33 U.S.C. (Supp. V) 921(b)(3)), but the Board did not reach the substantive question; it vacated the deputy commissioner's decision on the ground that the 1972 amendment to Section 19(d) of the Act (33 U.S.C. (Supp. V) 919(d)) had deprived the deputy commissioner of authority to resolve any contested issue even if no evidentiary hearing was necessary. *Rasmussen* v. *Geo Control, Inc.*, BRB No. 132–73, decided December 6, 1973.

The dispute then came before an administrative law judge, who rejected the OWCP's construction and sustained the survivors' position that the weekly rate of death benefits under the Longshoremen's Act is subject to no maximum limitation (App. C, *infra*, pp. 27A–74A).

The Director of the OWCP and the employer and insurer appealed to the Benefits Review Board, which

affirmed the administrative law judge's decision (App. B, *infra*, pp. 15A–25A). The Board acknowledged the "apparent incongruity" of having a ceiling on the weekly benefits payable to a permanently totally disabled worker but no limitation on the rate of compensation payable to the surviving family should the worker die (*id.* at 18A). Nevertheless, following the administrative law judge's analysis of the legislative history of the 1972 amendments to the Longshoremen's Act benefits structure, the Board concluded that "elimination of the maximum benefit provision from Section 9(e) of the Act * * * was done consciously and intentionally" (*id.* at 22A), and "that failure to substitute a new maximum was * * * a deliberate action" (*id.* at 22A–23A). The Board agreed with the administrative law judge's construction of Section 6(d), limiting its effect on death benefits to the annual upgrading of payments at the *minimum* level established by amended Section 9(e) (*id.* at 23A).

The Director and the employer and insurer sought review by the court of appeals under Section 21(c) of the Act (33 U.S.C. (Supp. V) 921(c)). The court of appeals affirmed the Board's decision, generally following its reasoning (App. A, *infra*, pp. 1A–14A). The court found that Section 6(d) is no more than an ambiguous indication that the Section 6(b)(1) limitations apply to death benefits (*id.* at 7A–8A and n. 5), while Section 9(e) is an unambiguous indication,

shown by its legislative history not to have been inadvertent, that death benefit rates are subject to no upper limits (*id.* at 8A–11A). The characterization of the effect of Section 6(d) in the Congressional Committee reports was found to be "overwhelmingly outweighed by the contrary purport of the legislative history as a whole" (*id.* at 8A, n. 5). The "premium on death" represented by the absence of a maximum weekly rate, the court found, "does appear to have its advocates" (*id.* at 11A–12A and n. 8), and is reflected as well in the difference between the *minimum* limitations of Section 6(b)(2) and Section 9(e) (*id.* at 13A–14A and n. 9).

REASONS FOR GRANTING THE WRIT

1. Two other circuits have considered the Board's decision in this case, on review of other cases in which the Board adhered to it; each, independently, disagreed with the Board and adopted the Director's administrative construction. *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F. 2d 337 (C.A. 3); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F. 2d 210 (C.A. D.C.).

The court of appeals in this case acknowledged its direct conflict with those decisions, but relegated them to a footnote (App. A, *infra*, p. 14A and n. 10), as it did Section 6(d) and the Congressional Committee's reports describing the effect of that provision (*id.* at 7A and n. 5). The court had full opportunity to consider the decisions of the other courts of appeals, and they in turn had fully considered the position of the Board (and of the administrative law judge) in this

case, the reasoning of which was followed here. The conflict is thus not likely to be resolved without the aid of this Court.[3]

2. To be sure, the number of cases affected by the question is relatively small. Since October 1, 1975, when the Section 6(b)(1) limitation became 200 percent of the national average weekly wage, death-benefits awards involving more than one beneficiary are affected only when the deceased employee's average weekly wage was more than three times the national average, and single-beneficiary cases only when it was greater than four times the national average. These number some five a year.

On the other hand, there remain about forty cases in which death occurred in the first three years after passage of the 1972 amendments, when the ceilings were lower. Although very few of those cases have entered formal litigation (because the insurers have been responsible for and have paid benefits at least up to the Section 6(b)(1) maximum), the question of addi-

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[3] The present position of the Benefits Review Board is not clear. In *Dolan* v. *United Brotherhood of Carpenters & Joiners*, 7 BRBS 377, petition for review pending, C.A. 4, No. 78–1160, decided two days before issuance of the court of appeals' decision in this case, the Board withdrew from the position it had adopted here, acquiescing in the construction given Section 6(d) by the District of Columbia and Third Circuits. The Board may revert to its earlier position in light of the judicial approval it has now received; no case is now pending before the Board calling for the choice to be made. In any event, however, the Court of Appeals for the Ninth Circuit, having expressly disclaimed reliance on administrative construction (App. A, *infra*, p. 7A), is unlikely to follow the Board in any change of view.

tional compensation remains to be decided and will be governed by the outcome of this case. They cannot be compromised (see *S. H. Du Puy* v. *Director, Office of Workers' Compensation Programs,* 519 F. 2d 536 (C.A. 7), certiorari denied, 424 U.S. 965), and if the conflict among the circuits is not resolved, each of these cases will proceed at least to the appropriate court of appeals, and probably will be brought to this Court on petition for certiorari regardless of its disposition there.

The sums involved are not inconsiderable. Although the amount at stake in this case—more than $300,000—is somewhat unusual, many of the other pending disputes implicate substantial additional awards. Moreover, the mere potential of very high recoveries in death cases will significantly affect insurance rates and may imperil some small enterprises which, unable to afford Longshoremen's Act insurance, would be required to cease operations. See Section 32 of the Act, 33 U.S.C. 932.

3. In our submission, the decision below is erroneous. What the court has held is that, unlike cases of disability, when a covered worker dies there is no absolute ceiling on the weekly benefits payable to his dependents. The only limits recognized by the court are those fixed as a percentage of the wages of the deceased by Section 9 (*supra,* pp. 5–6). We submit, on the contrary, that Section 6(d) (*supra,* p. 5) makes applicable to death cases, like all others (albeit with a slight difference as we explain in a moment), the absolute ceilings announced by Section 6(b)(1)

(*supra,* p. 4)—now 200 per cent of the national average weekly wage.

We believe the court's result is at odds with the language of the statute, its legislative history and what may be assumed to have been the congressional intent to avoid disparate treatment.

First, the reasoning of the Board and of the courts of appeals makes Section 6(d) of the Act meaningless. That provision refers to "determinations"[4] and says that these "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits." In the court's view, this means only that "the applicable * * * weekly wage" spoken of in Section 9(e) (*supra,* p. 6)—and there made the minimum "base" wage used in calculating death benefits—shall be the current national wage determined annually by the Secretary of Labor under Section 6(b)(3) (*supra,* p. 5). But this is already made clear by Section 10(f) of the Act (33 U.S.C. (Supp. V) 910(f)) for all cases of permanent total disability and death. If Section 6(d) does no more than announce that the minimum benefits in such cases shall be governed by these annual computations, it is entirely superfluous.

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[4] There are no "[d]eterminations under" Section 6(d) itself; all have agreed that "this subsection" in amended Section 6(d) of the Act refers to Section 5(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1252–1252—and hence to Section 6(b)–(d) of the Act. *Director, Office of Workers' Compensation Programs* v. *O'Keefe, supra,* 545 F. 2d at 344; *Director, Office of Workers' Compensation Programs* v. *Boughman, supra,* 545 F. 2d at 215. Cf. App. A, *infra,* pp. 7A–8A, n. 5.

In our submission, the true scope of Section 6(d) is made clear in the legislative history of the 1972 amendments, which the court misread. To be sure, Section 9(e) was deliberately written to eliminate a limitation based on the amount of the employee's *actual* wages that would be considered. But the provision is wholly silent on our question: whether the ceiling imposed by Section 6(b)(1) on the *benefit rate* applies in death cases. That is resolved by the Committee reports (S. Rep. No. 92–1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 3 (1972)):

> To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in [to the ultimate new maximum weekly benefit rate of 200 per cent of the national average weekly wage], their compensation is to be increased as the ceiling moves to 200 percent.

This explains that, by virtue of Section 6(d), the ceilings apply in a special way to cases of permanent total disability and death. Unlike the compensation for lesser degrees of disability, the minimum rate of benefits for permanent total disability and death is not frozen: it is always to be the specified percentage of the workers' pre-injury wages, adjusted under Section 10(f), subject only to the Section 6(b)(1) limitation *currently* in effect—not that determined for the period during which the injury or death occurred.

Finally, the decision fails to suggest any rational basis for a congressional discrimination against the totally disabled in favor of the survivors of a deceased employee.[5] We share "the commonsense conviction" expressed by the Court of Appeals for the District of Columbia Circuit (*Boughman, supra,* 545 F. 2d at 213) that:

> Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee, in need of continuing care, should be compensated less generously than the family of an employee who dies. It is hardly within the policy of this Act to place a premium on death. [Footnote omitted.]

[5] It is true, as the court noted, that an argument for considering restoring a larger fraction of lost wages in death cases is discussed in the *Report of the National Commission on State Workmen's Compensation Laws* (1972). See p. 71 of the *Report* and App. A, *infra*, p. 12A, n. 8. But that *Report* nowhere suggests that the absolute ceilings on benefits should be inapplicable or different in death cases. See *Report*, *supra*, at 37–38, 60–62, 64–65, 71–72.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1978.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-2038

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER-APPELLANT

vs.

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR., RESPONDENTS-APPELLEES

No. 75-2172

GEO CONTROL, INC., AND NEW HAMPSHIRE INSURANCE COMPANY, PETITIONERS

vs.

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR. (WILLIAM C. RASMUSSEN, DECEASED), RESPONDENTS

Decided January 20, 1978

OPINION

On Petition to Review a Decision of the United States Department of Labor Benefits Review Board

Before MERRILL and TRASK, *Circuit Judges,* and TAKASUGI,* ***District Judge***

*Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

MERRILL, *Circuit Judge:*

Petitioners seek review of a decision and order of the Benefits Review Board awarding compensation to respondents as survivors of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act.[1]

William C. Rasmussen, in 1973, was employed by petitioner Geo Control, Inc., as hydrologist under a public work contract between Geo Control and the United States. His average weekly wage was $798. His employment was covered by the Defense Base Act, 42 U.S.C. §§ 1651, *et seq.*, which incorporates the Longshoremen's and Harbor Workers' Compensation Act (the Act), and Geo Control's liability for compensation under the Act was covered by insurance provided by petitioner New Hampshire Insurance Co.

On May 11, 1973, Rasmussen, while in the course of his employment by Geo Control in Vietnam, received fatal injuries while traveling as a passenger in a motor vehicle which triggered a land mine explosion. Respondent Genevieve O. Rasmussen is his surviving widow and is entitled to death benefits under the Act. Respondent William C. Rasmussen, Jr., is his surviving son and is entitled to benefits until his 18th birthday, or, if he qualifies under the Act as a student, until his 23d birthday.

A dispute arose as to the amounts of compensation to which respondents were entitled. In due course a

[1] The Act, 33 U.S.C. §§ 901, *et seq.*, provides certain defined workers with compensation for disability and death suffered in the course of their employment. Section 919 provides for hearings on claims for compensation to be conducted by administrative law judges. Section 921(b) establishes a Benefits Review Board, authorized to hear and determine appeals from orders entered by administrative law judges. Section 921(c) provides for judicial review by the courts of appeals of orders of the Benefits Review Board.

hearing was had before an administrative law judge, and on October 24, 1974, the judge ordered petitioners Geo Control and New Hampshire Insurance Co. to pay to Mrs. Rasmussen from May 11, 1973, and continuing during her widowhood the sum of $399 a week, being 50 percent of her husband's average weekly wage at the time of his death. The judge further ordered those petitioners to pay the son, from May 11, 1973, until his 23d birthday, unless his status as student terminated earlier, the sum of $137 a week, being 16⅔ percent of the average weekly wage of the deceased. Appeals from that order were taken to the Benefits Review Board. The board sustained the decision of the administrative law judge and these petitions for review followed. Joining Geo Control and New Hampshire Insurance Co. in petitioning for review is the Director, Office of Workmen's Compensation Programs, United States Department of Labor.

Under the Act, compensation for death is provided by 33 U.S.C. § 909. Compensation for disability is covered by §§ 906 and 908. All three of these sections were substantially amended in 1972 to give disabled persons and survivors increased benefits and protection against continuing inflation. A problem in statutory construction is presented by the contention that the provisions for disability and those for death, as amended in 1972, are inconsistent with each other.

Prior to the amendments, § 908(a) and (b) provided for total disability payments of 66⅔ percent of the worker's average weekly wage during the course of disability.[2] Section 906(b) provided limitations on

[2] In an effort to simplify an extremely complex problem of statutory construction, irrelevant detail, elaboration and exceptions are ignored, and the statute and statutory scheme are discussed in general terms.

the disability payments: a maximum of $70 and a minimum of $18. With respect to death benefits § 909 (b) of the Act provided surviving spouses with benefits during widowhood or dependency amounting to 35 percent of the average weekly wage, plus 15 percent for each surviving minor child, with the total not to exceed 66⅔ percent of such wages. Section 909 (e) provided maximum and minimum compensation by setting limits on the weekly wage used to calculate the benefits:

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

33 U.S.C. § 909(e).

The 1972 amendments made no change in the disability payments provided by § 908 (a) and (b). The whole basis for the limitations imposed by § 906(b) on compensation for disability was changed, however. Instead of fixing a dollar maximum and minimum, limitations were fixed by reference to the national average weekly wage. Section 906(b)(2) fixed the minimum for total disability at not less than 50 percent of the national average (or, if it be a lesser amount, the employee's average weekly wage). Section 906(b)(1) provided a maximum for disability ultimately reaching 200 percent of the national average by October 1, 1975, but gradually attaining that figure by annual increases commencing at 125 percent during the period ending September 30, 1973. The manner in which the applicable national average weekly wage was to be determined was set forth in § 906(b)(3),

and the duty of making that determination was assigned to the Secretary of Labor.[3]

The section covering death benefits, § 909(b), was amended to increase the compensation to the surviving spouses to 50 percent of the deceased's average weekly wage and that of the minor children to 16⅔ percent, but retained the 66⅔ percent limit on the total amount payable. The section setting the minimum and maximum limitations, § 909(e), was amended to read:

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[3] Section 906(b), as amended in 1972, states:

"(b)(1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

"(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

"(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

"(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

"(D) 200 per centum beginning October 1, 1975.

"(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

"(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972."

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

33 U.S.C. § 909(e). It is the construction of that subsection with which we are concerned.

Taken literally, the amendment of the subsection does two things. First, consistently with the provisions for limitations on disability compensation in § 906(b) (1) and (2), the minimum compensation for death benefits was fixed by reference to the national average weekly wage instead of by specific dollar amounts as in the original Act. Second, unlike § 906 (b), however, and unlike the original Act, while a minimum limitation on the average weekly wage was provided, no maximum was provided.[4]

The result is that for death compensation can be more liberal than for disability—that should a disabled person die his widow could realize an increase in compensation over that received prior to death. As one court has commented, it puts "a premium on death" to provide "that a totally disabled employee, in need of continuing care, could be compensated less generously than the family of an employee who dies."

[4] There still are limits on compensation but they are only those in § 909 (b), (c) and (d), which provide that "the total amount payable shall in no case exceed 66⅔ per centum of such wages," and that in § 906(e), which provides that where the national average weekly wage is used to calculate the compensation, the compensation may not exceed the weekly wage of the deceased, and thus places a maximum on the minimum compensation. (The appropriate percent of the national average weekly wage, which is to operate as minimum, cannot exceed the actual weekly wage.)

Director, Office of Workers' Compensation Programs v. *Boughman*, 545 F. 2d 210, 213 (D.C. Cir. 1976).

The Director, Office of Workers' Compensation Programs, has taken the position since 1972 that to avoid this anomaly § 909(e) must be construed to incorporate the maximum limitations provided by § 906 (b)(1). This is the position he took in this matter before the administrative law judge and the Benefits Review Board, and which both judge and board rejected.

In support of that position petitioners rely on certain instances in the Act and in legislative history in which employees and survivors are linked together in such a way as to suggest that certain provisions of the Act apply to both disability and death compensation.[5] These instances, having reference to

[5] First, they refer to § 906(d), which reads: "Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." We read the "determinations" there mentioned as having reference to those provided for by § 906(b)(3) (*see* n. 3)—determinations by the Secretary of the applicable national average weekly wage. These determinations are not confined to cases of disability. The amendment of § 909(e) specifically embraced them by providing, as the minimum death benefit, a percent of "the national average weekly wage as prescribed in section 906(b) of this title * * *."

As for § 906(d), all it says is that the Secretary's determination of national average weekly wages with respect to a certain period shall not only apply to those who first begin receiving compensation during that period, but shall also apply to those who are already receiving benefits. This provision rationally relates to those receiving death, as well as disability, compensation. We do not regard as significant the fact that Congress chose to put the substance of this subsection, relating to both survivors and dis-

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language far from clear or precise, do not in our judgment cast light on the legislative intent.

The difficulty with petitioners' position is that on its face the language of § 909(e) is not ambiguous. Their position rests on an assumption that the choice of this unambiguous language by Congress, and its failure expressly to incorporate the maximum limitations of § 906(b)(1), was inadvertent—that Congress had not meant to say what it had clearly said. The presumption to the contrary is not lightly to be overturned, and in our judgment petitioners have failed to meet their burden in this respect. Indeed, legislative history as recited at length in the 39-page Decision and Order of the administrative law judge in our view convincingly demonstrates that Congress was

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abled employees, in a section that has principal reference to disability. Given the clear, limited meaning of § 906(d) it cannot be read as incorporating into § 909, dealing with death benefits, the limitations of § 906(b)(1), which refer specifically to compensation for disability.

The Director also relies on language appearing in both Senate and House Reports and in remarks of a senator from the floor of the Senate: "To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase in, their compensation is increased as the ceiling moves to 200%."

The phase-in to which reference is made is the gradual annual increase from 125 percent to 200 percent of the national average provided by § 906(b)(1). The language thus suggests that the gradual increase in the maximum limitations provided by that subsection should apply to survivors as well as to disabled employees. This is, indeed, ambiguous. However, as we later discuss in the text of our opinion, as an indication of legislative intent it is overwhelmingly outweighed by the contrary purport of the legislative history as a whole.

fully aware of what it was doing and that the absence of maximums in § 909 was not inadvertent.

From the outset, one of the controversial questions presented in connection with the amendment of the Act had to do with the elimination of the maximum limitations. Two bills were presented in the Senate: S. 2318 eliminated the maximum limits as to both disability and death benefits;[6] S. 525 increased the benefits but retained maximum limitations. *Hearings, supra* n. 6, at 15, 19. The two bills were vigorously debated, both on the floor of the Senate and by witnesses in Senate hearings. Representatives of labor testified at length in support of S. 2318 to the effect that it would "eliminate the artificial and totally unrealistic restrictions on benefit amounts." *Hearings, supra* n. 6, at 156–57. Time after time, senators and representatives speaking on the bills and witnesses testifying thereto pointed out that § 10(d) of S. 2318, amending § 909(e) of the Act, would eliminate the maximums on compensation (save the 66⅔ percent of the deceased's actual average weekly wage). *See* Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, Public Law 92–576) prepared by the Subcomm. on Labor of the Comm. on Labor and Public Welfare, U.S. Senate, Dec. 1972. Time after time, the Senate Report and the House Report, in summarizing major provisions of the bill and in section-

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[6] *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare on S. 2318, and S. 525, and S. 1547*, 92d Cong., 2d Sess. 6, 8 (hereinafter cited as *Hearings*).

by-section analyses, pointed out this effect of § 10(d) of S. 2318.[7]

The Senate Report, in compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, showed the changes in existing law made by the bill as follows, with existing law proposed to be omitted enclosed in brackets and new matter printed in italics:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased.

S. Rep. No. 1125, supra n. 7, at 40. The House Report, in compliance with Rule XIII of the Rules of the House of Representatives, showed the change in § 9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.*

H.R. Rep. No. 1441, supra n. 7, at 37.

It is difficult to see how, in light of this history and the manner in which the extent of the amendment was graphically illustrated, it can be maintained that Congress was unaware of the fact that while maximum limitations were imposed as to disability benefits they were eliminated as to death benefits.

It is argued, however, that no matter what the record may show the result is so irrational that it simply cannot have been intended. We cannot agree. One may well believe that dispensing with maximum limitations in the case of death benefits while retaining them in the case of disability is not the wisest legislative choice. As a choice, however, it clearly has received recognition and it does appear to have its advocates, and thus would seem to be entitled to the respect regularly accorded to a course legislatively chosen. As quoted by the administrative law judge, a report of the National Commission on Workmen's Compensation Laws, while favoring equality of benefits, recognizes that arguments have been advanced in favor of dispensing with maximum limitations in the case of death while retaining them for disability. The argument is to the effect that any limitation is undesirable, that reasons for imposing such limits in the case of disability (other than economy) do not exist in the case of death, and that the cost of fully compensating for death would be relatively small.[8] *See* The Report of the National Commission on State

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[7] S. Rep. No. 1125, 92d Cong., 2d Sess. 6, 22 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4, 19, *reprinted in* [1972] U.S. Code, Cong. & Ad. News 4698 at 4701, 4716. As one example, the section-by-section description of the amendment in the House Report states: "Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased." H.R. Rep. No. 1441, at 19.

Workmen's Compensation Laws, at 71 (1972). The legislative choice thus can be read as a compromise with the course sought by representatives of labor: the elimination of maximum limits across the board.

Finally we note that had Congress intended death benefits to have the same limitations as disability benefits it would have been extremely simple to make the limitations provisions applicable to both. Instead Congress deliberately chose to compute limitations in the two cases by entirely different methods. For disability the limitations of § 906(b)(1) and (3) are imposed directly upon the compensation awarded. For death the limitation of § 909(e) is imposed upon the figure from which compensation is to be computed.

This choice of Congress—to fix limitations in the two cases by different language and different meth-

[8] The portion of the report to which the administrative law judge refers states:

"Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. As the ultimate tragedy, work-related death deserves full compensation. The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program.

* * * * *

"* * * In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivational problems, which suggests that replacement of more than the normal 66⅔ percent of loss wages is appropriate." The Report of the National Commission on State Workmen's Compensation Laws, at 71 (1972).

ods—actually serves to extend the advantage of death over disability beyond that realized from the elimination of maximum limitations. By the manner in which *minimum* limitations respectively are fixed, death benefits (in a case where the deceased is survived by a spouse and one or more children) have been rendered superior to disability benefits as to some employees (those whose average weekly wages are less than the national average but greater than one half the national average).[9]

[9] The following examples indicate how the provisions governing minimum compensation for death and disability differ in hypothetical calculations:

If we assume the Secretary has determined that the applicable national average weekly wage is $100, the compensation for an employee whose actual average weekly wage was $60 would be determined as follows:

1. *Total Disability Benefits*

Under § 908(a) the employee would normally receive 66⅔ percent of his average weekly wage, or $40. However, § 906(b)(2) states that the minimum compensation shall be 50 percent of the national average weekly wage, or $50. An employee in this situation would receive $50 compensation for total disability.

2. *Death Benefits*

Under §909(b), if, for example, the employee is survived by a widow or widower and one or more children, the total amount payable is 66⅔ percent of the average weekly wage of the deceased, or $40. However, § 909(e) states that where the average weekly wage is less than the national average weekly wage, the national average should be used in place of the employee's actual average, and here we should take 66⅔ percent of $100, or $66.66. § 909(e) then limits this minimum compensation to the actual average weekly wage, so the survivors would receive $60 compensation.

Making these same assumptions, the minimum compensation calculations for employees with average weekly wages greater than half the national average weekly wage and less than the national

If we are to bring disability and death benefits into a state of consistency we must, then, do more rewriting of § 909(e) than simply incorporating into it a form of the phase-in of § 906(a)(1). We must also rewrite the minimum limitations.

This course we reject. Where Congress has chosen to articulate limitations in the two cases by wholly different language, establishing different methods for computation, we find little rational persuasion in an argument that it must nevertheless have intended the results to be the same.

We conclude that petitioners have failed to meet their burden of establishing that Congress did not knowingly and intentionally eliminate the maximum limitations on death benefits in § 906(e). We must respectfully disagree with two decisions rejecting the decision of the Benefits Review Board in this matter and holding in accordance with the views of the Director.[10]

The judgment of the Benefits Review Board is affirmed.

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average weekly wage result in greater compensation for death than disability, as the following chart indicates:

National average	Employee's average	Death benefits	Total disability
$100	$100	$66.66	$66.66
100	99	66.66	66.00
100	75	66.66	50.00
100	60	60.00	50.00
100	51	51.00	50.00
100	50	50.00	50.00

[10] *Director, Office of Workmen's* [sic] *Compensation Programs* v. *Boughman*, 545 F. 2d 210 (D.C. Cir. 1976); *Director, Office of Workmen's* [sic] *Compensation Programs* v. *O'Keefe*, 545 F. 2d 337 (3d Cir. 1976).

APPENDIX B

BRB Nos. 74-204 and 74-204A

GENEVIEVE O. RASMUSSEN AND WILLIAM C. RASMUSSEN, JR. (WILLIAM C. RASMUSSEN, DECEASED), CLAIMANTS-RESPONDENTS

v.

GEO CONTROL, INC. AND NEW HAMPSHIRE INSURANCE COMPANY, EMPLOYER/CARRIER-PETITIONERS

Director, Office of Workers' Compensation Programs, United States Department of Labor, *Petitioner*

DECISION

Appeals from Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

John R. Coyle and Bernard B. Smyth (Ogden and Coyle), Washington, D.C., for claimants.

Edward J. Haniver, New York, New York, for employer-carrier.

Jean S. Cooper (William J. Kilberg, Solicitor of of Labor, Marshall H. Harris, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: WASHINGTON, Chairperson, HARTMAN and MILLER, Members.

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Washington, Chairperson:

These appeals seek review and modification of a Decision and Order (74-LHCA-118) of Administrative Law Judge William B. Devaney in which death benefits were awarded to the claimants. The claim in question was filed pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act), as made applicable to employment at certain defense base areas by the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. § 1651 *et seq.*

The facts in this case are not in dispute and were stipulated by the parties. The decedent was employed as a hydrologist by the employer in Vietnam under a public works contract with the United States. On May 11, 1973, while traveling as a passenger in a jeep, Rasmussen sustained fatal injuries from a land mine explosion. At the time of his fatal accident, the decedent was performing services for the employer and his death arose out of and in the course of his employment. The decedent's average weekly wage was $798.00.

The claimants are the decedent's surviving widow and minor son. There is no question that they are entitled to receive death benefits pursuant to Section 9(b) of the Act, 33 U.S.C. § 909(b). The carrier commenced payment of death benefits to the claimants voluntarily at a rate of $167.00 per week, which it believed to be the statutory maximum. On October 17, 1973, the carrier stopped paying the son's share because he had reached his eighteenth birthday, and reduced the widow's benefit to $133.00 per week. Despite written direction from the deputy commissioner, the carrier failed to correct the widow's benefits up to the $167.00 per week rate, which the deputy commissioner also believed to be the statutory maximum. The carrier apparently suspended all payments on April 11, 1974, nine days after the formal hearing before the administrative law judge.

The administrative law judge awarded the widow death benefits based on fifty percent of the decedent's average weekly wage, plus the cost of living adjustment and interest, pursuant to Sections 9(b) and 10(f) of the Act, 33 U.S.C. §§ 909(b), 910(f). The decedent's son was awarded benefits based on 16⅔ percent of the decedent's average weekly wage, plus the cost of living adjustment and interest, pursuant to Sections 9(b) and 10(f) of the Act, 33 U.S.C. §§ 909(b), 910(f). An additional award was made of a ten percent penalty on the difference between the amounts due and paid during the period from October 17, 1973, to April 15, 1974, pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e). In addition, the claimant's attorney, a federal government employee acting with permission of his agency, was awarded a fee, subject to several express conditions.

In these appeals, the employer and carrier and the Director, Office of Workers' Compensation Programs, contend that death benefits awarded pursuant to Section 9 of the Act are limited by the maximum weekly amount provided for disability benefits in Section 6(b)(1). 33 U.S.C. §§ 906(b)(1), 909. The employer and carrier also argue that six percent interest and a ten percent penalty should not have been awarded.

The clear language of Section 9(b) of the Act, 33 U.S.C. § 909(b), provides the method of computation of death benefits and prescribes the maximum amount payable.

> * * * [T]he total amount payable shall in no case exceed 66⅔ per centum of such [average weekly] wages. * * *

Prior to amendment of the Act in November 1972, Section 9(e), 33 U.S.C. § 909(e), had provided both a maximum limit and a minimum limit in computation of death benefits. The maximum provided was, in effect, $70.00 per week, the same maximum limit prescribed by Section 6(b), 33 U.S.C. § 906(b), for disability payments at that time. However, in amending the Act, Congress eliminated the maximum and retained only a minimum limit. Section 9(e) now reads as follows:

> In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased. 33 U.S.C. § 909(e).

Elimination of the provision limiting the maximum amount payable in death benefits to the same figure provided for disability compensation creates an anomalous situation. If an employee were rendered permanently, totally disabled by an employment-related accident, his maximum compensation would be limited by the provisions of Section 6(b)(1) of the Act, 33 U.S.C. § 906(b)(1), no matter what his actual average weekly wage was. If the same employee subsequently died, or if he had been killed outright in the accident, his survivors could be entitled to a larger sum in death benefits than was payable in disability compensation.

Given this apparent incongruity, the Board finds it appropriate to look beyond the plain language of

the statute and consider persuasive evidence of legislative intent. *Boston Sand and Gravel Co.* v. *United States,* 278 U.S. 41 (1928). We are mindful that in construing a statute, the intent of Congress is to be ascertained and given effect. *United States* v. *N.E. Rosenblum Truck Lines, Inc.,* 315 U.S. 50 (1942). However, in construing a statute, a court must construe what Congress has written and may neither add, subtract, delete nor distort words used. *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593 (1951). Moreover, although consistent administrative construction of a statute is entitled to great weight in interpreting the statute, *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), a court need not defer to the administrative construction when there are compelling indications that it is wrong, *Espinoza* v. *Farah Manufacturing Co., Inc.,* 414 U.S. 86 (1973). Where the words of a later statute differ from those of a previous one on the same or related subject, the legislature must have intended them to have a different meaning. *Klein* v. *Republic Steel Corp.,* 435 F. 2d 762 (3d Cir. 1970). Finally, where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded. *J. Ray McDermott and Co.* v. *Vessel Morning Star,* 457 F. 2d 815 (5th Cir. 1972), *cert. denied sub nom, Fish Meal Co.* v. *J. Ray McDermott and Co.,* 409 U.S. 948 (1972).

In his Decision and Order in this case, the administrative law judge exhaustively analyzed the applicable provisions of the Act and the relevant legislative history. Having reviewed that Decision and Order in light of the principles enumerated in the preceding paragraph, the Board concludes that the administra-

tive law judge correctly determined that the maximum limit on disability compensation according to the provisions of Section 6(b)(1) of the Act does not apply to death benefits awarded under Section 9(b). 33 U.S.C. §§ 906(b)(1), 909(b).

The Report of the Senate Committee on Labor and Public Welfare, which described the major provisions of the bill amending the Act, discussed maximum and minimum benefit amounts. With reference to survivor benefits, the report states,

> "* * * The amended Act will provide a fifty percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages.
>
> * * * * *
>
> "A minimum death benefit tied to the applicable national average weekly wage, but not to exceed the employee's average weekly wage is also provided." S. Rep. No. 92–1125, 92d Cong., 2d Sess. 6 (1972).

In its section-by-section analysis of the bill to amend the Act, the Senate Committee referred to the amendment creating a new Section 6(b)(1), 33 U.S.C. § 906(b)(1), only in terms of compensation for disability; death benefits were not referred to either specifically or by implication. The pertinent section reads,

> *Section 5(a)* [of the bill] amends the Act by deleting subsection 6(b) and substituting new sections (b), (c) and (d). Subsection (b)(1) states that, except as provided in subsection (c), compensation for disability may not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3). * * * S. Rep. No. 92–1125, 92d Cong., 2d Sess. 17 (1972).

In its discussion of death benefits, the Senate Committee indicated no intent to apply the maximum amount for disability compensation provided in Section 6(b)(1) to death benefits provided by Section 9(b). 33 U.S.C. §§ 906(b)(1), 909(b). The report merely states that,

> *Subsection 10(b)* [of the bill] amends Section 9 (b) and (c) to increase all 35 percent shares of death benefits therein to 50 percent and all 15 percent shares to 16⅔ percent. S. Rep. No. 92–1125, 92d Cong., 2d Sess. 21 (1972).

It is clear that Congress did intend to relate the *minimum* disability compensation provided by Section 6(b)(1), 33 U.S.C. § 906(b)(1), to death benefits. Both the language of the Act and the legislative history make this apparent. In the legislative history, it is stated that,

> *Section 10(d)* [of the bill] amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. However, maximum weekly death benefits could not be more than the employee's average weekly wages. S. Rep. No. 92–1125, 92d Cong., 2d Sess. 22 (1972).

However, no reference is made to application of the Section 6(b)(1) maximum to death benefits. 33 U.S.C. § 906(b)(1). The former provision in Section 9(e), 33 U.S.C. § 909(e), which set a maximum amount on death benefits, was eliminated from the amendment. In the absence of any evidence to the contrary, we must conclude that elimination of the maximum provided for disability cases from death benefits cases was intentional. The maximum limit on death benefits is provided in Section 9(b), 33 U.S.C. § 909(b),

and relates solely to the employee's actual weekly wages.

The summary of principal amendments in the Report of the Committee on Education and Labor of the House of Representatives closely parallels the Senate Report. It is, therefore, unnecessary to discuss those provisions of that Report. They are merely cumulative of the indication of legislative intent contained in the Senate Report. Pertinent comments are contained in the "Summary of Major Provisions of the Bill." H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 2–4 (1972).

In its "Section by Section Description of Committee Amendment to the Bill", the House Report contains language which indicates that elimination of the maximum benefit provision from Section 9(e) of the Act, 33 U.S.C. § 909(e), was done consciously and intentionally.

> Subsection (d) of this section amends Section 9(e) of the Act, eliminating the dollar minimum and maximum set out under present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in Section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased. H.R. Rep. No. 92–1441, 92d Cong., 2d Sess. 19 (1972).

This language suggests that the Committee was aware that both the maximum and minimum benefit provisions were being eliminated from the old Act and that only a revised minimum benefit was substituted. There is no evidence whatever to suggest that failure to substitute a new maximum was anything other than a deliberate action.

It is argued that Section 6(d) of the amended Act refers to both maximum and minimum benefits payable under Section 9 so that both the maximum and minimum compensation payable under Section 6(b) also apply to death benefits awarded pursuant to Section 9. 33 U.S.C. §§ 906(b), 906(d), 909. Section 6(d) reads as follows:

> Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period. 33 U.S.C. § 906(d).

The administrative law judge found that this provision refers only to minimum benefits. The Director argues that this provision can be reasonably construed only if it refers to both maximum and minimum benefits, because the redetermined national average weekly wage does not apply to survivors currently receiving benefits. However, Section 10(h) of the Act, 33 U.S.C. § 910(h), provides for an upward adjustment of death benefits for persons currently receiving such benefits, calculated with reference to the redetermined national average weekly wage. Therefore, the Board finds that the administrative law judge correctly construed Section 6(d) as applying only to minimum benefits. 33 U.S.C. § 906(d).

The employer and carrier contend that interest should not be assessed against them on the unpaid portion of weekly compensation as each installment became due, dating from May 11, 1973, until the date paid. This Board has held that assessment of six per-

cent interest on past due payments of compensation is mandatory. *Ryan* v. *McKie Co.*, 1 BRBS 221, BRB Nos. 74–160 and 160A (December 10, 1974). The administrative law judge correctly assessed interest in this case.

The employer and carrier further protest the assessment of a ten percent penalty, pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e), against them for failure to pay the correct installment of compensation due without an award from October 17, 1973, until April 15, 1974. In a recent decision, the Board has held that such a penalty is mandatory in the absence of timely notice of controversion filed pursuant to Section 14(d), or of evidence in the record indicating that failure to make such payments was beyond their control. *McCabe* v. *Ball Builders, Inc.*, 1 BRBS 290, BRB No. 74–181 (January 31, 1975). In this case, the administrative law judge correctly assessed the penalty against the carrier on the difference between the amount paid and the amount the deputy commissioner directed to be paid, rather than on the difference between the amount paid and the full amount actually due. The deputy commissioner, acting erroneously, but in accordance with LS/HW Program Memorandum No. 42, entitled "Legal Opinion Regarding Maximum Death Benefits Payable Under LS/HWCA", issued by the Office of Workmen's [Workers'] Compensation Programs on September 20, 1973, ordered payment of death benefits in an amount equal to the statutory maximum for disability compensation. The employer and carrier's incorrect interpretation of Section 9(b) of the Act, 33 U.S.C. § 909(b), confirmed by the deputy commissioner, should not be held against them except to the extent that they failed to pay the maximum amount directed by the deputy commissioner.

The claimant's attorneys have requested that a fee be awarded to them and against the carrier for services rendered in proceedings before this Board, pursuant to Section 28(b) of the Act, 33 U.S.C. § 928(b). A complete statement of the extent and character of necessary work done has been submitted in accordance with the Board's regulations. 20 C.F.R. §§ 702.132, 802.203. The Board finds that a fee of $3000 is appropriate in this case and hereby approves an award of that sum against the carrier, pursuant to Sections 28(b) and (c) of the Act, 33 U.S.C. §§ 928(b), (c).

The Decision and Order of the administrative law judge is hereby affirmed in all respects.

/s/ Ruth V. Washington
RUTH V. WASHINGTON,
Chairperson.

We Concur:

/s/ Ralph M. Hartman
RALPH M. HARTMAN,
Member.

/s/ Julius Miller
JULIUS MILLER,
Member.

Dated in Washington, D.C. this 3d day of April 1975.

APPENDIX C

IN THE MATTER OF GENEVIEVE O. RASMUSSEN, AND WILLIAM C. RASMUSSEN, JR., (WILLIAM C. RASMUSSEN, DECEASED), CLAIMANTS

AND

GEO CONTROL, INC., EMPLOYER

AND

NEW HAMPSHIRE INSURANCE CO., CARRIER

Case No. 74-LHCA-118

(Formerly 15-11022)

Nicholas E. Karatinos, Esq., 16102 Pond Meadow Lane, Bowie, Maryland 20715, for the Claimants

Edward J. Haniver, Esq., New Hampshire Insurance Company, c/o AIU Corporation, 102 Maiden Lane, New York, New York 10015, for the Employer and Carrier

Jean S. Cooper, Esq., U.S. Department of Labor, 14th & Constitution Avenue, N.W., Washington, D.C. 20210, for the Government

Before WILLIAM B. DEVANEY, *Administrative Law Judge*

DECISION AND ORDER

STATEMENT OF THE CASE

William C. Rasmussen, a civilian employee of Geocontrol, Inc. (hereinafter also "Employer"), died in South Vietnam as a result of a land mine explosion on May 11, 1973. The central issue in this case is the amount of death benefits payable under Section 9 of the Act.[1] The Employer and its insurance carrier, New Hampshire Insurance Company (hereinafter referred to as "Employer" unless otherwise indicated), and the Director, Office of Workmen's Compensation Programs (hereinafter also "Director") assert that the maximum limitation of Section 6 of the Act, 33 U.S.C. § 906, applicable to disability benefits, is also applicable to death benefits payable under Section 9 of the Act, 33 U.S.C. § 909. Claimant asserts that the maximum limitation on death benefits is determined solely by the provisions of Section 9 of the Act.

A hearing was duly held, pursuant to notice, in Washington, D.C. on April 2, 1974. Since the primary issue for resolution was the legal issue as to the weekly rate of compensation for death under the 1972 amendments to the Act, all parties were invited to file briefs prior to hearing, to present oral argument at the

[1] This is a claim under the Defense Base Act, 55 Stat. 622 as amended, 42 U.S.C. § 1651, *et seq.*, as amended, and, as made applicable thereby, the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, as amended. Herein, the Longshoremen's and Harbor Workers' Compensation Act, to the extent made applicable by the Defense Base Act, is referred to as the "Act".

hearing, and to submit post hearing briefs.[2] All briefs and comments and the argument of all parties have been carefully considered.

Upon the entire record in this case, I make the following findings, conclusions, and order.

FINDINGS OF FACT

The facts are not in dispute, and the following have been stipulated by the parties (Joint Stipulation) as follows:

1. That on May 11, 1973, William C. Rasmussen (hereinafter referred to as "Employee") was in the employ of the Employer as a hydrologist, under a public work contract between the Employer and the United States, in South Vietnam, which is in the 15th Compensation District established under the provisions of the Defense Base Act; that said employment was covered by the Defense Base Act and, as made applicable thereby, the Act.

2. That the liability of the Employer for compensation under the Act was insured by the New Hampshire Insurance Company.

3. That on May 11, 1973, Employee, while performing services for the Employer and while travelling as a passenger in a jeep suffered his death as the result of fatal injuries sustained from a land mine explosion;

[2] Employer requested postponement of the hearing principally on the ground that the issue of the rate of benefits payable under Section 9 of the Act, as amended, was a case of first impression and of interest to the insurance industry. The motion was denied on March 28, 1974, by telegram, but leave was granted at that time until May 2, 1974, for the submission of additional, or supplemental, views or comments by the parties and by any person as *amicus curiae* having an interest in the matter herein involved.

and that the death arose out of and in the course of employment.

4. That Employee's average weekly wage was $798.00 per week.

5. That funeral and burial expenses exceeding $1,000.00 were incurred by Genevieve O. Rasmussen, surviving widow (hereinafter also sometimes referred to as "Widow" and, collectively with her son as "Claimants"); and that Employer is liable for funeral expenses in the statutory maximum amount of $1,000.00.

6. That Genevieve O. Rasmussen, who was born February 1, 1918, and married to the Employee on January 2, 1942, is the surviving widow of the Employee and, as such, she is entitled to death benefits in her own behalf beginning May 11, 1973, and continuing thereafter subject to the provisions of the Act.

7. That William C. Rasmussen, Jr. (hereinafter also referred to as "Son"), also known as William Charles Rasmussen, Jr., who was born on October 17, 1955, is the surviving child of the Employee and, as such, was entitled to death benefits beginning May 11, 1973, and continuing until his eighteenth birthday, October 17, 1973, and thereafter until his twenty-third birthday, October 17, 1978, if, and during, his qualification as a "student" as defined by the Act; that death benefits due on behalf of the Son shall be payable to Genevieve O. Rasmussen his mother and natural guardian.

8. That timely notice of claim was given to Employer.

In addition, the following facts are also undisputed:

9. Son was duly enrolled as a student in the 12th grade in the Overseas School of Rome, Via Cassia, 811, 00819 Rome, Italy, for the academic year 1973–

74, beginning September, 1973, (Cl. Exhs. 15, 16). Son was currently attending school at the time of the hearing, with expected graduation in June, 1974, and the parties stipulated that the Overseas School of Rome is an accredited high school within the meaning of the provisions of the Act (Tr. 24–25).

10. A policy of insurance for workman's compensation was issued by New Hampshire Insurance Co. (hereinafter individually referred to as "Carrier") (Cl. Exh. 1, pp. 2, 7). The policy was not offered in evidence; but correspondence, received in evidence without objection, states that the annual premium on Employee's policy was in excess of $1,800.00. (Cl. Exh. 1, pp. 49, 44). Form BEC–570–1 (Cl. Exh. 1, p. 2) recites that Policy No. 83–2 33 33, beginning April 10, 1973, and expiring April 10, 1974, named as employer Geocontrol, Inc. (William C. Rasmussen & Associates, Inc.)

11. Form BEC–206, entitled "Payment of Compensation Without Award", was filed by Carrier and was dated October 1, 1973 (Cl. Exh. 1, p. 41). Item 8 shows average weekly wage "$798.00". Following this, the form states "Multiplied by ½=compensation $" and Carrier inserted "167.00". Item 9 stated compensation will be paid from 5/11/73 and date of first payment, item 10, was shown as 10/1/73. Item 7 listed as names of injured or dependents of injured, to whom compensation will be paid: Genevieve O. Rasmussen and William C. Rasmussen, Jr.

12. On October 18, 1973, Deputy Commissioner Donald C. Reichart entered a Compensation Order and Award of Death Benefits (Cl. Exh. 1) which was subsequently set aside by the Benefits Review Board because issued in contravention of the adjudication procedure for contested issues. *Genevieve O. Rasmus-*

sen, et al., v. *Geocontrol Inc., et al.* BRB No. 132–73 (1973). The Award stated, in part, as follows:

> The employer * * * and the insurance carrier * * * shall pay death benefits to Mrs. Genevieve O. Rasmussen in her own behalf at the rate of 50 percent of the weekly wages of the employee and in behalf of William C. Rasmussen, Jr. at the rate of 16⅔ percent of the weekly wages, subject to a basic maximum amount payable in behalf of all beneficiaries of $167 per week, beginning May 11, 1973 and continuing subject to the limitations of the Act or until further ordered. * * * (Cl. Exh. 1).

13. By letter dated September 21, 1973 (Cl. Exh. 1, p. 40), Assistant Deputy Commissioner Reichart advised Carrier as follows:

> * * * the maximum weekly benefit being $167 (representing a combined rate of $125.25 in behalf of the widow and $41.75 in behalf of the child).[3]

[3] The basis for this compensation is set forth in LS/HW Program Memorandum No. 42, dated September 10, 1973 (Cl. Exh. 1, pp. 38–39), which provided, in part, as follows: "In cases where an employee is survived by a widow and one or more children, the total benefit payable is divided between the widow and the children, in spite of the fact that the widow's 50 percent of the deceased employee's wages alone exceeds the maximum. In such cases the death benefit would be divided to pay the widow three-fourths of the amount payable representing her share of the 66⅔ percent total. The remaining 16⅔ percent or one-fourth of the total would be paid to the child or children."

The computation: Widow's share=$167.00×75%=$125.25; children's share=167.00×25%=41.75.

Carrier's repeated assertion at the hearing that its computation of $125.25 for the widow's benefit was based on, "* * * the average national weekly wage of $250.50, you take a half of that, you've got $125.25. Then, you bring it up to $133 with the increase. But that's the maximum where there's a widow alone." (Tr. 40) (See, also, Tr. 33, 34, 35, 38, 39, 43) began with an erroneous figure. It is conceivable that Carrier was struggling for justification on the basis of the Wage Table, enclosure to OWCP Bulletin No. 1073, which shows as "allowable earnings" effective October 28, 1972 (not prior to amendment, see, ALJ Exh. 1) $250.50, which is the amount when multiplied by 66⅔% (Section 8 of the Act) would equal $167.00. In any event, Carrier's position was based on no provision of the Act as amended, its professed basis "national average weekly wage of $250.00" was totally erroneous (national average weekly wage for 1972 was $131.80, see enclosure to OWCP Bulletin No. 10–73); and its position is contrary to the provisions of Section 9 of the Act.

14. Effective October 17, 1973, Carrier ceased paying Son benefits because he had reached the age of 18 and, at the same time, reduced "the widow's portion to $125.25 per week" plus the cost of living increase required by Section 10(f) of the Act (6.49%) and "we come up with a total of $133.00 weekly, which we are presently paying." (Carrier's letter dated December 4, 1973, Cl. Exh. 11).

15. By letter dated December 5, 1973, Deputy Commissioner Reichart informed Carrier as follows:

> "The compensation due in this case *shall be paid in bi-weekly installments* * * * Adjust your interval for payment. Information has been received you are compensating Mrs. Rasmussen at a rate of $133 per week, rather than the $167 as awarded. Please correct this and advise." (Cl. Exh. 12.)

16. Despite the direction of the Deputy Commissioner to pay the benefits due in bi-weekly installments and that the amount due Mrs. Rasmussen was $167.00 per week, Carrier was, as of April 2, 1974,

despite instruction of counsel to correct the frequency of payment, still making monthly payments in the total amount of $133.00 (Tr. 44–45).

17. Carrier, by letter dated April 18, 1974, addressed to the undersigned (hereby incorporated as a part of the record as ALJ Exh. 3–A) enclosed a copy of Form BEC–208 entitled "Compensation Payment Stopped or Suspended" (hereby incorporated as a part of the record as ALJ Exh. 3–B) which recites that payments from 5/11/73 through 9/30/73 at the rate of $167.00 had been made to Widow and Son; and that payment from 10/1/73 through 4/11/74 at the rate of $178.00 ($167.00 plus adjustment pursuant to Section 10(f) of the Act) had been made to Widow and Son.

CONCLUSIONS

I. PENALTY PURSUANT TO SECTION 14(e) OF THE ACT

Claimant seeks imposition of a 10 percent penalty, pursuant to Section 14(e) of the Act, on the difference between the amount paid, as adjusted pursuant to Section 10(f) of the Act, of $133.00 and the amount due, as adjusted, of $178.00, from October 17, 1973, until paid. Section 14(e) provides, in part, as follows:

> (e) If any installment of compensation is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment * * *

Section 14(b), referred to in Section 14(e) provides, in part, as follows:

> (b) * * * [first installment] *Thereafter compensation shall be paid in installments, semi-monthly,* except where the deputy commissioner determines that payment * * * should be made monthly or at some other period. (Emphasis supplied).

Carrier initially denied that Widow was the surviving wife (Cl. Exh. 1, p. 32) but, following the Assistant Deputy Commissioner's letter of September 12, 1973 (Cl. Exh. 1, p. 40) retracted its denial of eligibility and filed Form BEC–206, "Payment of Compensation Without Award" on or about October 1, 1973 (Cl. Exh. 1, p. 4). Carrier showed a single computation in item 8—average weekly wage $798.00×½=$167.00, which demonstrated no doubt or reservation on Carrier's part that Widow, in her own right, was entitled to not less than $167.00, and, accordingly, made no computation for Son. The Deputy Commissioner by letter dated October 4, 1973, notified the parties that he intended to make an award on October 17, 1973, which would call for compensation payments at a maximum weekly rate of $167 (Cl. Exh. 1, p. 42) and his Compensation Order of October 18, 1973, was quite specific that Carrier pay benefits to Widow *in her own behalf at the rate of 50% of the average weekly wages of Employee* and in behalf of Son at the rate of 16⅔% of the weekly wages, *"subject to a basic maximum amount payable in behalf of all beneficiaries of $167* per week" (Cl. Exh. 1). Carrier on October 20, 1973, unilaterally reduced total benefit payments from $167 previously paid Widow and Son to $133 paid Widow alone (Cl. Exh. 10, attached Carrier Voucher No. D42707). Objection was made by counsel for Widow, by letter dated November 23, 1973 (Cl. Exh. 10), to the reduction in

the amount of benefit payment *and* he questioned payment on a monthly basis. The Deputy Commissioner, by letter dated December 5, 1973, directed Carrier to pay Widow $167 (plus adjustment under Section 10(f)) (Cl. Exh. 1) biweekly (Cl. Exh. 12).

The letter of the Assistant Deputy Commissioner, dated December 11, 1973 (ALJ Exh. 1) set forth the position of the parties: first, that of Claimant; second, that of the Director; and, third, that of Carrier. The Assistant Deputy Commissioner did not, as asserted by Carrier at the hearing (Tr. 41–42), offer three options to Carrier. To the contrary, he merely stated, in referring the matter to this Office for hearing, the positions of the parties.

Sections 14 (b) and (e) of the Act require that compensation be paid in semimonthly installments unless the Deputy Commissioner determines otherwise. Here the Deputy Commissioner directed semimonthly payment and Carrier failed and refused to comply with the statutory requirement and/or the direction of the Deputy Commissioner of December 5, 1973, until at least sometime after April 2, 1974. Although it is assumed that semimonthly payments were begun following the hearing, as counsel for Carrier assured would be done, there is no indication in Carrier's letter of April 18, 1974 (ALJ Exh. 3–A and 3–B) that semimonthly payments have, in fact, been made.

Carrier's computation, in conjunction with its payment of compensation without award, shows that Widow was entitled, in her own behalf, to benefits of $167.00 weekly. The Compensation Order of October 18, 1973, in clear and unambiguous language, required the payment to Widow, in her own behalf, of one half the agreed average weekly wage of $798.00, subject

to a basic maximum amount in behalf of all beneficiaries of $167.00 per week. Because the Compensation Order and Award was set aside by the decision of the Benefits Review Board on December 6, 1973 (BRB No. 132–73, Cl. Exh. 9), payment of compensation must be considered as compensation payable without an award; nevertheless, the computation of benefits, as shown therein, constituted notice to Carrier of the Deputy Commissioner's position concerning the payment due Widow in her own behalf. Carrier's unilateral action in reducing the total benefit paid Widow on and after October 17, 1973, was contrary to the provisions of Section 9(b), was neither authorized nor required by Section 6(b)(1), was contrary to the instructions of the Deputy Commissioner, and was an erroneous and incorrect determination of the compensation payable to Widow without an award. Carrier had filed no cross appeal from that portion of the Compensation Order and Award of October 18, 1973, which fixed the benefit payable to Widow; and Carrier had filed no notice of controversion pursuant to Section 14(d) of the right of Widow to benefits in excess of $125.25. Moreover, as noted above, Carrier disregarded the provisions of the statute with regard to frequency of payment and, after the Deputy Commissioner on December 5, 1973, directed semimonthly payment, Carrier failed and refused to make semimonthly payments to Widow at least through April 2, 1974.

Accordingly, as Carrier failed to pay the benefits due within fourteen days after each installment became due from and after October 17, 1973, until April 15, 1974, Carrier will be ordered to pay, in addition to each installment, an amount equal to 10 per centum of the difference between the amount paid ($133) and the amount due ($178) on each weekly installment after October 17, 1973, to April 15, 1974.

II. DEATH BENEFIT COMPENSATION

A. POSITION OF THE PARTIES

Claimants contend that, pursuant to Section 9(b) of the Act, Widow is entitled to a death benefit [4] of 50 per centum of the average wages of the deceased ($798.00) or $399.00 per week and Son is entitled to an additional amount of 16⅔ per centum of the average wages of the deceased ($798.00) or $133.00 per week until his 23rd birthday, October 17, 1978, so long as he shall remain a full-time student as defined in Section 2(18) of the Act. In addition, the benefits computed pursuant to Section 9(b) of the Act would be subject to further adjustment in accordance with Section 10(f) of the Act effective October 1 of each year beginning October 1, 1973. Claimants seek the death benefits described from the date of Employee's death, May 11, 1973; but Employer and Carrier have paid, as of April 15, 1974 (ALJ Exh. 3–A and 3–B), a total benefit on behalf of both beneficiaries (Widow and Son) of $167.00 per week plus the adjustment required on such amount pursuant to Section 10(f) of the Act from October 1, 1973.

The Director agrees with Claimants as to the computation of death benefits under Section 9(b) of the Act and concedes that Section 9(e) does not, because, he contends, of obvious "oversight" by Congress, specifically incorporate the maximum limitation of Section 6(b)(1) of the Act as to death benefits, but asserts that the maximum limitation of Section 6(b)

[4] Reasonable funeral expenses not exceeding $1,000 are provided by Section 9(a) of the Act. Funeral benefits in the sum of $1,000.00 have been paid (ALJ Exh. 3–B) and, therefore, this benefit will not be further considered.

(1) is specifically linked to, and made applicable to, Section 9 death benefits by Section 6(d) of the Act which provides as follows:

> (d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Accordingly, the Director's position is that a widow, for example, is entitled, in her own behalf, to a death benefit of 50 percent of the average weekly wages of the decedent and a child to 16⅔ percent of the average weekly wages of the decedent, all death benefits being subject, however, to the maximum statutory limitation as set forth in Section 6(b)(1); and the widow's benefit, computed under Section 9(b), when in excess of the statutory maximum of Section 6(b)(1) is not subject to reduction when the child ceases to be entitled to benefits.

Employer adopts the position of the Director with respect to the maximum limitation on death benefits but further contends, contrary to the position of the Director, that Widow, upon Son's 18th birthday, was entitled to only $125.25, plus the adjustment required by Section 10(f). The latter contention of Employer has already been rejected as erroneous and contrary to the provisions of the Act.

B. SECTION 9(e)

Prior to the amendments of 1972, Section 9(e) had read as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been *not more* than $105 nor *less* than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased. (Emphasis supplied).

Both a maximum, $105.00, and a minimum, $27.00, of "average weekly wage" was provided.

Section 9(e), as amended, now provides that the average weekly wages of the deceased shall be considered to have been *not less than the applicable national average weekly wage* as prescribed in section 6(b). There is no maximum limitation on the average weekly wages of deceased.

C. LEGISLATIVE HISTORY

1. *The Amendment of Section 9(e) of the Act*

Senate Report 92–1125, 92nd Congress 2nd Session (1972), in compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, showed the changes in existing law made by the bill as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic (underscored herein), existing law in which no change is proposed is shown in roman):

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor] less than [$27] *the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly [compensation] *benefits* shall not exceed the *average* weekly wages of the deceased. (S. Rep. 92–1125 at p. 40; *Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972* (hereinafter referred to as "Legislative History"), p. 102).

House of Representatives Report No. 92–1441, in compliance with rule XIII of the Rules of the House of Representatives, showed the change in Section 9(e) as follows:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not [more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased] *less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.* (H.R. Rep. 92–1441 at p. 37; Legislative History at p. 243).

2. *Hearings*

S. 2318 was introduced in the Senate July 20, 1971 (Legislative day, July 19) and, *inter alia,* proposed elimination of the maximum limitation on average weekly wages on compensation for disability (Sec. 4(a) of the bill, Legislative History, p. 6) and the elimination of the maximum limitation on average weekly wages on death benefits (Sec. 10(b) of the bill, Legislative History, p. 10). In each instance, the amount payable would be a percentage of average weekly wages with stated minimums. Sec. 10(b) of the bill provided as follows:

> (b) Section 9(e) of such Act is amended to read as follows:
> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than $80 but the total weekly compensation shall not exceed the weekly wages of the deceased.

The provisions of H.R. 12006, introduced in the House December 2, 1971, were the same (See, Sec. 4(a), Legislative History, p. 146, and Sec. 10(b), Legislative History, p. 149–150).

By contrast, S. 525, introduced by the late Senator Prouty, proposed an increase in benefits but retained a maximum limitation both in Section 6 and in Section 9(e) of the Act.[5]

Hearings on bills S. 2318, S. 525 and S. 1547 to amend the Longshore Act convened May 2, 1972, before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senator Eagleton presiding.[6] Senator Eagleton summarized the intent of the three bills before the Subcommittee as follows:

> * * * S. 2318, which I cosponsored with Senator Williams, would eliminate the maximum payment limitations. It would also provide for the Secretary of Labor to make an annual calculation of the increase in wages so as to upgrade the benefits for those already on disability from year to year.
>
> The second bill, S. 525, introduced by the late Senator Prouty at the request of the administration, would also increase the benefits although retaining a maximum limitation. This bill would also extend the coverage of the Longshore Act to include shipowners as employers.

[5] S. 525 proposed to amend section 9(e) of the Act as follows: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $178.50, nor less than $52.50 * * *" (Hearing p. 19).

[6] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearing before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess., on S. 2318, S. 525 and S. 1547, herein the volume is referred to as "Hearings" followed by the appropriate page.

> S. 1547, introduced by Senator Tower, would extend the coverage of the Longshore Act to workers employed in off-shore oilwell operations. (Hearings, p. 2).

There was extensive testimony in support of the proposed elimination of maximum limitation provisions by S. 2318 and there was testimony in support of retention of maximum limitation as proposed by S. 525. Howard McGurgan, Legislative Representative, AFL–CIO, with respect to "Maximum and Minimum Limits of Disability Compensation and Allowance", stated, in part, as follows:

> Mr. Chairman, the AFL–CIO is opposed to the weekly benefit amount proposals in S. 525 because they fail to meet the fundamental goal of workmen's compensation. * * *
>
> * * * * * *
>
> Section 8 (a), (b), and (c) of the Longshoremen's Act specifies that the weekly wages replacement shall be 66 2/3 percent of the injured worker's average weekly wage, and the AFL–CIO would like to see this goal achieved. (Hearing, p. 63).

With respect to "Death Benefits", Mr. McGurgan stated, in part, as follows:

> In addition, the weekly wage used to compute death benefits in other cases would be the weekly wage of the unfortunate victims. The AFL–CIO supports this approach to the computation of death benefits. We sincerely hope the committee will adopt the proposal contained in S. 2318. (Hearings, p. 65).

Patrick Tobin, Washington Representative, International Longshoremen's & Warehousemen's Union, stated, in part, as follows:

> We join with the International Longshoremen's Association, AFL–CIO, the District of

Columbia AFL–CIO representatives, and other Unions in supporting S. 2318 and opposing S. 525. (Hearing, p. 133).

Thomas W. Gleason, President of International Longshoremen's Association, AFL–CIO, in a prepared statement, stated, in part, as follows:

> We strongly support the enactment of S. 2318 as the most effective proposal to accomplish the long overdue increase in the benefit levels of injured longshoremen. First and foremost, that bill would eliminate the artificial and totally unrealistic restrictions on benefit amounts. This would enable compensation awards, for the first time, to reflect realistically the loss of earnings suffered by injured employees. * * * (Hearings, p. 157).

Frank Bonadio, President of Building and Construction Trades Department, AFL–CIO, in a prepared statement, stated, in part, as follows:

> * * * The Williams' bill (S. 2318) would correct the inequities that exist under these two Federal laws and is consistent with the intent and purpose of workmens' compensation laws when they were initially enacted in the first two decades of this century. We urgently request the (sic) the Committee give favorable consideration to this proposal.
>
> On behalf of the Building and Construction Trades Department, AFL–CIO we fervently trust that the Committee will give full consideration to these recommendations and at the earliest opportunity will report to the Senate a bill which will provide full protection to the workers and their families covered by the Act against the crippling effects of on-the-job injuries. (Hearings, pp. 688–689).

Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, in a letter to Senator Williams, stated in part, as follows:

> I would appreciate the inclusion in your records of this letter of support by the Teamsters Union for S. 2318. * * * Similarly, we state our opposition to parallel measures S. 525 and S. 1547 * * * (Hearings, p. 700).

Ralph Hartman, then Assistant Manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corporation, together with Edward Hood, President and Board Chairman of the Shipbuilders Council of America, testified on behalf of Shipbuilders Council of America. Mr. Hartman stated, in part, as follows:

> * * * The industry has an obligation to its employees, and we are aware of the fact that they are exposed to hazards and hazardous employment, and we are interested that they receive an equitable and fair loss of earnings replacement. The wage loss replacement concept is the basic underlying objective of workmen's compensation.
>
> It is on this premise that we endorse the basic concepts of S. 2318, and propose innovations or variations which we consider urgent and demanding, yet equitable to all concerned. (Hearings, pp. 170–171).

* * * * *

> Of major impact and importance to the industry are the proposals to increase weekly benefits. One such proposal would amend section 6(b) of the Act by increasing the minimum weekly rate from $18 to $54 and eliminating the present maximum weekly benefit rate of $70.
>
> We agree that the minimum rate should be increased. However, this proposal leaves us

with a weekly benefit rate of two-thirds of the employee's average weekly earnings without limitation.

Currently the reported weekly average wage in the shipbuilding and ship repair industry approximates $165.

I have just learned this morning that the Quarterly Report issued by the Bureau of Labor Statistics shows that figure now to be for the first quarter, $173.

That covers straight time, overtime, shift work differentials, vacation, and holiday allowances. Applying the two-thirds factor to $165 could result in an average weekly compensation rate of $110. This we do not question, but we do recognize our obligation to all employees, some of whom would not be adequately compensated if limited to two-thirds of the weekly wage in the industry.

I make this point parenthetically because a number of States have recently removed a fixed-dollar maximum and set the maximum rate at two-thirds of the State average weekly wage; two-thirds of the man's average wage, subject to a maximum of two-thirds of the State average weekly wage.

We recognize the intent of the proposal, and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66 and two-thirds percent of the injured employee's average weekly wages computed under section 10, subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry.

Assuming the average weekly wage as stated, that is, $165, and applying the 150 percent factor, projects a maximum weekly rate of $247.50 in the industry. The average weekly wage in the industry could readily be obtained

from the quarterly reports published by the Bureau of Labor Statistics. (Hearings, pp. 171–172).

* * * * *

Mr. Hood, I would like to say that Mr. Hartman's statements reflect a consensus of the membership of the Shipbuilder's Council. (Hearings, p. 177).

In his prepared statement, Mr. Hartman referred specifically to the proposed amendment of Section 9(e) of the Act and stated as follows:

> Section 10(b) of the bill would amend Section 9(e) of the Act by increasing from $27 to $80 the minimum average weekly wage base to be used in computing death benefits and would eliminate the current maximum average weekly wage base of $105. Here again, the industry suggests that the maximum be the average weekly wage in the shipbuilding and ship repair industry, as proposed in Section 6(b). (Hearings, pp. 203–204).

Edward D. Vickery, senior partner in the law firm of Royston, Rayzor, Cook & Vickery of Houston and Galveston, Texas, submitted a statement on behalf of the National Maritime Compensation Committee in which he stated, in part, as follows:

> Section 4 of S. 525
> and
> Section 4 of S. 2318
>
> Increases in Maximum and Minimum Limits of Compensation
>
> S. 525 would amend Section 6(b) to increase the maximum weekly compensation rate of $70 per week to $119 and the minimum rate from

$18 to $35; and would amend Section 14(m) to increase the statutory maximum portionately (sic) from $24,000 to $40,800 for all cases other than total permanent disability or death. S. 2318 would amend Section 6(b) by removing all maximum limits on the weekly compensation rate and would increase the minimum to $54 per week; and would repeal Section 14(m) in order to remove all monetary limits on compensation payments in all cases.

COMMENT: If the circular liability claims are eliminated, the National Maritime Compensation Committee recognizes that an increase in the maximum weekly compensation benefits is indicated, with a corresponding increase in the statutory maximum. The basic question presented by the provisions of the two bills is whether a maximum limit should be maintained on weekly compensation benefits and on all cases other than total permanent disability and death. The National Maritime Compensation Committee respectfully submits that it is of primary importance that the monetary maximum both on weekly benefit and in all cases other than those involving total permanent disability and death be maintained. * * * (Hearings, p. 318)

* * * * *

Section 8 of S. 525
and
Section 10 of S. 2318

INCREASE IN DEATH BENEFITS

S. 525 would increase death benefits payable to a widow from 35% to 45% and increasing compensation for the first child from 35% to 45% if there is no surviving wife. S. 525 retains the weekly maximum monetary limitations on

death benefits whereas S. 2318 removes all limitations on the weekly maximum monetary benefits and increases the allowance for funeral expenses from $400 to $800.

COMMENT: For the reasons previously discussed in some detail in connection with Section 4 of both S. 525 and S. 2318, we respectfully submit that it is not advisable to remove the monetary maximum benefits payable per week under the Longshoremen's Act and therefore recommend that the provisions of Section 8 of S. 525 be retained in this regard. * * * (Hearings, p. 334).

3. S. 2318 As Amended

The hearings before the Senate Subcommittee concluded on June 5, 1972. On September 13, 1972, Senator Eagleton reported a completely revised version of S. 2318 (Legislative History, pp. 15–61, original version pp. 3–12) which was accompanied by S. Rep. 92–1125 (Legislative History, p. 63). Sec. 5 of amended S. 2318 set forth the proposed amendments of Section 6(b) of the Act, as enacted, including subsection (d); and Sec. 10 of amended S. 2318 set forth the proposed amendments of Section 9 of the Act, Death Benefits, as enacted. Subsection 10(d) of amended S. 2318 set forth the proposed amendment of Section 9(e) of the Act, as enacted. As already noted in Section 1 of this Part C, S. Rep. 92–1125, beginning at page 26, Legislative History, page 88, showed the changes in existing law, and at page 40 of the Report, page 102 of the Legislative History, the changes in Section 9(e) of the Act made by amended S. 2318. Deletion of the maximum limitation on average weekly wages thus appears to have been a purposeful change.

S. Rep. 92–1125 discussed the Major Provisions of the Bill and begins with "Improvement of the Bene-

fit Structure" at page 5 (Legislative History, p. 67). The first item discussed thereunder was *Maximum and minimum benefit amounts,* and the Report stated, in part, as follows:

> The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. * * *
>
> Section 5 of the bill amends the Act to provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor * * *
>
> To the extent that * * * survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent. * * * (S. Rep. 92–1125, p. 5; Legislative History, p. 67).

The next item discussed under "Improvement of the Benefit Structure", was, *Survivor Benefits,* and the Report stated, in part, as follows:

> The benefit structure for survivors is altered to provide additional benefits for widows and children * * * Section 9 of the Act (Section 10 of the bill) is amended to increase funeral benefits from the present 400 dollars to a more realistic amount of 1,000 dollars. The present Act provides that a surviving wife or husband receives 35 percent of the award, and children receive 15 percent. The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children,

> *subject to a maximum of 66⅔ percent of the average weekly wages.*
>
> * * * * *
>
> A minimum death benefit tied to the applicable national weekly wage but not to exceed the employee's average weekly wage is also provided. (S. Rep. 92–1125, p. 6; Legislative History, p. 68) (Emphasis supplied).

S. Rep. 92–1125, beginning at page 16 of the Report (page 78 of the Legislative History), also set forth a Section by Section Analysis of S. 2318 and provided, in part, as follows:

> *Section 10(d)* amends section 9(e) to provide that in computing death benefits the employee's average weekly wage shall be considered as not less than the national average weekly wage. *However, maximum weekly death benefits could not be more than the employee's average weekly wages.* (S. Rep. 92–1125, p. 22; Legislative History, p. 84) (Emphasis supplied).

S. 2318 was passed by the Senate September 14, 1972 (Legislative History, p. 139).

H.R. 12006 was introduced by Congressman Daniels on December 2, 1971 (Legislative History, p. 143) and on September 25, 1972, was reported with an amendment, committed to the Committee of the Whole House on the State of the Union (Legislative History, p. 159). H.R. 12006, as amended, was identical to S. 2318, and was accompanied by H.R. Report No. 92–1441, 92nd Cong., 2nd Sess. (1972). As noted in Section 1 of Part C, H.R. Rep. 92–1441, beginning at page 24, Legislative History at page 230, showed the changes in existing law, and at page 37, page 243 of the Legislative History, the changes in Section 9(e) of the Act. The changes in Section 9(e) of the Act are shown in a different manner than in S. Rep. 92–

1125 which is a further indication that deletion of the maximum limitation on average weekly wages was a purposeful change.

H.R. Report 92–1441 provided a Summary of Major Provisions of the Bill, beginning at page 2 of the Report, page 208 of the Legislative History, and the text of the Summary with respect to "Survivors Benefits" is identical to the language of S. Rep. 92–1125 under the same heading (See, H.R. Rep. 92–1441, p. 4, Legislative History, p. 210). H.R. Rep. 92–1441 also contained a Section-By-Section Description of Committee Amendment to the Bill, beginning at page 14 of the Report, page 220 of Legislative History, and with respect to Section 10 of the bill stated, in part, as follows:

Section 10

This section amends section 9 (pertaining to compensation for death) of the Act.

* * * * *

Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under the present law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the act, except that *the total weekly benefits may not exceed the actual average weekly wages of the deceased.* (H.R. Rep. 92–1441, p. 19: Legislative History, p. 225). (Emphasis supplied).

Congressman Daniels spoke in support of the bill on October 14, 1972, and stated, in part, as follows:

Mr. Speaker, I would like to go into the major provisions of the bill.

A basic requirement of the act is for the injured worker to receive 66⅔ percent of his average weekly wage. As the result of the 12 year freeze, very few workers now actually receive this figure. The bill seeks to correct this deficiency. It provides *that the maximum compensation for disability shall not exceed a percentage of the national weekly wage* to be determined by the Secretary of Labor.

* * * * *

It provides increased benefits to widows and dependent children.

* * * * *

It provides increased benefits to survivors of workmen killed as a result of job injuries.

* * * (Legislative History, p. 286) (Emphasis supplied).

Congressman Steiger, on October 14, 1972, stated, in part, as follows:

Mr. Speaker, I rise in support of this much-needed improvement in the Longshore Compensation Act.

Because the time is so short my extension will include a series of questions and answers which discuss the most substantive issues included in this bill.

* * * * *

The questions and answers follow: (Legislative History, pp. 297–298)

* * * * *

Question. Do the amendments change the death benefits?

Answer. Under present law, the maximum allowed for funeral expenses is $400. The bill raises this maximum to $1000. Also, a surviving wife or dependent husband is now entitled to

compensatory payments equaling 35 percent of the deceased's average wage, and 15 percent of the deceased's average wage for each dependent child. The percentage for the surviving spouse is raised by the bill to 50 percent and the percentage for each dependent child is raised to 16⅔ percent. The Act's present total compensation maximum of 66⅔ percent of the deceased's average wage is retained * * * (Legislative History, p. 301).

H. R. 12006 was passed on October 14, 1972 (Legislative History, p. 307); S. 2318 was amended by striking out all after the enacting clause and provisions of H.R. 12006 inserted in lieu thereof and the amendment was agreed to by the House (Legislative History, p. 324); and on October 14, 1972, the presiding officer laid before the Senate the amendment of the House of Representatives to the bill (S. 2318). (Legislative History, p. 331). Before concluding action on S. 2318, Senator Williams made, in part, the following statement:

* * * This legislation represents the *first serious step toward reform of our society's workmen's compensation laws in the past 50 years.*

* * * * *

* * * Last year there were more than 109,000 injuries in this statute; 240 workers covered by the act were killed. * * * (Legislative History, p. 371).

* * * * *

The National Commission on Workmen's Compensation laws which we created in passing the Occupational Health and Safety Act of 1970 has submitted a comprehensive report and recommendation of the need to upgrade workmen's compensation standards nationwide including if necessary the imposition of Federal standards.

In the limited but significant area covered by

the Longshoremen Act we have attempted to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission.

I shall in the near future be giving careful consideration to a measure which will implement or improve upon the National Commission's recommendations and I certainly expect to use the improvements in this bill as a model. (Legislative History, p. 372).

* * * * *

The bill amends the act to provide that the maximum compensation for disability shall not exceed 200 percent of the national average weekly wage * * * (Legislative History, p. 374).

* * * * *

The benefit structure for survivors is altered to provide additional benefits for widows and children * * * The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages. * * * (Legislative History, p. 375).

Following Senator Williams' remarks and inclusion of telegrams of endorsement by unanimous consent (Legislative History, p. 380), Senator Javits moved that the Senate concur in the House amendment and the motion was agreed to. (Legislative History, p. 381).

4. Section 6(d) of the Act.

The Director asserts that the maximum limitation of Section 6(b)(1) is specifically linked to, and made applicable to, Section 9 death benefits by Section 6(d) of the Act. The Director's contentions have been most carefully considered but must be rejected as contrary

to the statute, as enacted, and contrary to the intent and purpose of Section 6(d).

Section 9(e) of the Act provides:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been *not less than the applicable national average weekly wage as prescribed in section 6(b)* but the total weekly benefits shall not exceed the average weekly wages of the deceased. (Emphasis supplied)

Section 6(d) of the Act provides:

> (d) Determinations under this subsection *with respect to a period shall apply to* employees or survivors currently receiving compensation for permanent total disability or death, as well as *those newly awarded compensation during such period.* (Emphasis supplied).

At the outset, the phrase *"Determinations under this subsection",* which, literally, refers to determinations under subsection (d), of which there are none, while now somewhat misplaced, was taken from Sec. 5(a) of the bill (S. 2318), *i.e.* Sec. 5(a) of the bill amended Section 6 of the Act by striking out subsections (b), (c) and (d). The reference to "Determinations under this subsection" obviously referred to determinations under subsection (a) of Sec. 5 of the bill (S. Rep. 92–1125, pp. 13–14, Legislative History, pp. 27–28). Accordingly, the reference to "Determinations under this subsection" is construed to mean determinations under Section 6 (b) and (c).

Of more significance is the limiting language which follows, namely, "Determinations * * * *with respect to a period*" shall apply, *inter alia,* to "those newly awarded compensation during such period". There is no dispute that survivors are included in the phrase,

"those newly awarded compensation" and for present purposes subsection 6(d) may be read as, "Determinations with respect to a period apply to surviors newly awarded compensation." Section 9(e) provides that the average weekly wages of the deceased shall be considered to have been "not less than the *applicable* national average weekly wage as prescribed in section 6(b)". Where the average weekly wage of the deceased is less than the national average weekly wage prescribed in Section 6(b), then the national average weekly wage is substituted for the "average weekly wage" under Section 9(e). Section 6(d) merely provides that determinations under Section (b) with respect to a period apply to survivors awarded compensation during such period. In other words, the national average weekly wage for the period in which eligibility begins is the "applicable national average weekly wage". See, for example, *Clarence Warren* v. *Jacksonville Shipyards, Inc., et al.,* 74–LHCA–3 (1974); *James Hutson* v. *Jacksonville Shipyards, Inc., et al.,* 74–LHCA–19 (1974).[7] Although, for ease

[7] The Claimants, Warren and Hutson, each became totally and permanently disabled as a result of silicosis prior to the effective date of the 1972 amendments. Claimant Warren died December 20, 1972, and Claimant Hutson died April 13, 1973, and in each instance death was caused by the disease of silicosis contracted in the course of employment. Each deceased earned less than the national average weekly wage and each survivor was awarded, pursuant to Section 9(e), death benefits as follows: Mrs. Warren, beginning December 20, 1972, and ending September 30, 1973, $65.90 per week (50% of National Average Weekly Wage of $131.80); beginning October 1, 1973, and ending September 30, 1974, $70.00 per week (50% of NAWW of $140.00); thereafter, effective October 1 of each year, the death benefit shall be adjusted in accordance with Section 10(f) of the Act. Mrs. Hutson, beginning April 14, 1973, and ending September 30, 1973, $65.90; beginning October 1, 1973, same weekly benefit as described for Mrs. Warren.

of determination, the National Average Weekly Wage for 1972 and 1973 was used in these decisions, the result, vis-a-vis the benefit payable, would be the same if the weekly death benefit for the initial period of eligibility (1972) were adjusted pursuant to Section 10(f).

Not only is this construction consistent with the language of Sections 9(e) and 6(d) of the Act, but S. Rep. 92–1125 plainly stated that this was the purpose and effect of Section 6(d). Thus, the Section-By-Section Analysis of S. 2318, stated:

> *Subsection (d) states that determinations of national average weekly wage made with respect to a period apply to* employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as *those who begin receiving compensation for the first time during the period.* (S. Rep. 92–1125, p. 18, Legislative History, p. 80) (Emphasis supplied).

H.R. Rep. 92–1441 in the Section-By-Section Description of Committee Amendments to the Bill (H.R. 12006) does not discuss this paragraph (H.R. Rep. 92–1441, p. 15, Legislative History, p. 221). Silence, alone, in this instance would negate any purpose to impose a limitation on weekly death benefit payments; but, as previously noted, H.R. Rep. 92–1441, in the Summary of Major Provisions of the Bill directly and categorically is to the contrary. Thus, in describing Survivor Benefits the Report stated:

> The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages. (H.R. Rep. 92–1441, p. 4, Legislative History, p. 210).

5. Report of the National Commission on Workmen's Compensation Laws

The Director also asserts that, as Senate Report 92–1125 states with respect to maximum and minimum benefit amounts set forth in Section 6(b)(1): "These maximums meet the recommended standards of the National Commission on State Workmen's Compensation Laws" (S. Rep. 92–1125, p. 5, Legislative History, p. 67), Congress must have intended to apply the 6(b)(1) maximum to death benefits. This argument is a non sequitur. First, this statement appears under the section entitled "Maximum and minimum benefit amounts", and clearly relates to the provisions for disability compensation (Section 6(b)(1) of the Act). Second, the reference is not repeated in the following section entitled "Survivor Benefits" where it is stated,

> The amended Act will provide a 50 percent award to surviving wives or husbands and 16⅔ percent to the children, subject to a maximum of 66⅔ percent of the average weekly wages.
>
> * * * * *
>
> A minimum death benefit tied to the applicable national average weekly wage but not to exceed the employee's average weekly wage is also provided. (S. Rep. 92–1125, p. 6, Legislative History, p. 68).

Accordingly, regardless of what may have been recommended by the National Commission on Workmen's Compensation Laws, Senate bill 2318, and the accompanying Report, provided, as to death benefits, 50% of average weekly wages of the deceased for the surviving wife or husband and 16⅔% of the children, subject only to a maximum of 66⅔ percent of the average weekly wages.

Third, the recommendations of the Commission were, in any event, minimum recommendations and, as Senator Williams stated, his intent, and I believe the prevailing intent in both the House and the Senate, was to provide a model of benefits and administration which we believe is in agreement with the *aims* of the National Commission." (Legislative History, p. 372).

Fourth, the Report of the National Commission fully supports the grant of a percentage of average weekly wages of the deceased without imposition of an arbitary limitation. Thus, the Report of the National Commission on Workmen's Compensation Laws, in Section E, "Death Benefits", stated in part, as follows:

> Work-related deaths account for less than one percent of all workmen's compensation claims and less than 10 percent of all benefits. *As the ultimate tragedy, work-related death deserves full compensation.* The infrequency of death claims permits payment of substantial death benefits at a relatively small cost in the total budget of a modern workmen's compensation program. (Emphasis supplied).

The Proportion of Lost Remuneration To Be Replaced

* * * Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wages of the deceased * * *

Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the

> proportion of wages to be replaced should be less in death cases than in total disability cases. *However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivational problems, which suggests that replacement of more than* the normal 66⅔ *percent of lost wages is appropriate.* * * * (Report at p. 71).

With such compelling considerations in mind, Congress, in enacting a model compensation act, would have found it difficult, consistent with its objective of wage loss replacement, to justify imposition of any arbitrary limitation on the 50% proportion of wage loss replacement for a widow, and it did not do so. Moreover, the record showed that in 1970 the weekly wage for longshoremen in New York and vicinity ranged from $184.00 for general cargo to $328.80 for explosives and damaged cargo (Hearing, p. 99); modal range for San Francisco-Oakland, June–August, 1969 from $150.00 to $249.00 per week (Hearing, p. 100); and $173.00 for the shipbuilding and ship repair industry for the first quarter of 1972 (Hearing, p. 171). Fifty percent of the highest figure ($328.80) would, pursuant to Section 9(b) of the Act, have resulted in a weekly benefit for a widow of $164.40 which might well have influenced the decision that a maximum limitation on death benefits was not required.

Conclusions as to Death Benefit Compensation

Section 9 of the Act provides as compensation for death, a percentage of the average wages of the deceased. Section 9(b) of the Act provides that if there is a widow or widower the benefit is 50 percent of the

average weekly wages of the deceased and if there is a surviving child, the additional amount of 16⅔ percent of such wages; but the total amount payable shall not exceed 66⅔ percent of such wages. Prior to the 1972 amendments to the Act, Section 9(e) of the Act had provided that in computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105. The 1972 amendments to the Act removed the arbitrary limitation and, as amended, Section 9(e) of the Act now provides:

> (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Section 6(b) contains limitations on maximum compensation for disability ranging from 125 per centum of the national average weekly wage, or $167, per week during the period ending September 30, 1973, to 200 per centum of the national average weekly wage beginning October 1, 1975; but the limitations set forth in Section 6(b)(1) are not applicable to death benefits under Section 9 of the Act and the limitations of Section 6(b)(1) are neither incorporated nor made applicable to death benefits by Section 6(d) of the Act.

As Mr. Justice Frankfurter stated, in *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593, 596 (1951), statutory construction,

> * * * is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.

Congress, in amending Section 9(e) of the Act, intentionally, and with full awareness of the limitation provided in Section 6(b)(1) of the Act as to disability compensation, removed the arbitrary limitation previously applied to compensation for death and, instead, provided that death benefits should be a percentage of the average weekly wages of the deceased provided only that the total weekly benefit shall not exceed 66⅔ percent of the average weekly wages of the deceased and/or if the average weekly wage of the deceased were less than the applicable national average weekly wage, then total weekly benefits (which would in such circumstance be a percentage of the national average weekly wage) shall not exceed the average weekly wages of the deceased.

The purpose of Congress in amending Section 9(e), *inter alia,* to remove the limitation previously existing on death benefits was clearly expressed in the language of the amendment and is fully supported by the legislative history. The contention of the Director, that it is totally foreign to workmen's compensation to make death benefits superior to benefits for disability, is a policy consideration which must be addressed to Congress. *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212, 224 (1970), *reh' denied,* 397 U.S. 929 (1970). Suffice it to say that Congress has demonstrated, both by word and by action, that it is not wedded even to long followed concepts of workmen's compensation (See, for example, Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.*) which Senator Javits described as archaic (Hearing, p. 36).

Rather, the intent of Congress in the 1972 amendments to the Act was "the first serious step toward reform of our society's workmen's compensation laws in the past 50 years" (Legislative History, p. 371) and to provide a "model of benefits and administration" (Legislative History, p. 372), and its removal of the limitation on maximum weekly earnings to be considered in computing death benefits was purposeful, with full awareness of the retained limitation on disability compensation, and in response to policy consideration which Congress obviously believed should control. I do not find the statute uncertain or ambiguous; but with full recognition that work-related death is the ultimate tragedy, to the extent that any "doubt" exists, "Doubts * * * are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton,* 220 F. 2d 820 (D.C. Cir. 1955); *Edith Alley* v. *Julius Garfinckel & Company, et al.,* BRB No. 74–111 at p. 6 (1974).

Accordingly, Widow was entitled to a death benefit of 50% of the Employee's average weekly wage of $798.00 from May 11, 1973, and Son was entitled to a death benefit of 16⅔% of the Employee's average weekly wage of $798.00 from May 11, 1973,[8] said death benefits being subject to further adjustment as of

[8] All computations are to be made by the Deputy Commissioner; however, for purposes of illustration, my computation shows Widow was entitled to $399.00 per week from May 11, 1973; Son to $133.00 from May 11, 1973, or a combined total of $532.00. Widow and Son, collectively, were paid benefits of $167.00 per week from May 11, 1973, collective sum of $365.00 per week is due from May 11, 1973, subject to adjustment as of October 1, 1973, and each October 1, thereafter in accordance with Section 10(f) of the Act. Benefits paid shall be fully credited against the amounts due and payable.

October 1, 1973, and October 1st of each year thereafter in accordance with the provisions of Section 10(f) of the Act. The foregoing benefits to continue as to Widow as provided in Section 9(b) of the Act; and as to Son as provided in Sections 9(b) and 2 (14) and (18) of the Act, i.e., until Son's 23rd birthday providing he continues to meet the definition of "student" as set forth in Section 2(18) of the Act and/or until Son ceases to be a "student" as set forth in Section 2(18) of the Act.

III. INTEREST

Interest at the legal rate of 6% per annum shall be paid on the difference between the amount of death benefits due from May 11, 1973, and the amount paid from May 11, 1973, said interest to run to the date of that order. In addition, Carrier shall, specifically, pay interest at the legal rate of 6 percent per annum on the difference between the death benefits due without an award ($178.00 as adjusted pursuant to Section 10(f)) and the amount paid ($133.00 as adjusted pursuant to Section 10(f)) from October 17, 1973, to April 15, 1974. *Humble Oil and Refining Company* v. *Taliaferro,* BRB No. 107–73 (1973).

IV. ATTORNEY'S FEE

Nicholas E. Karatinos, attorney for Claimants, seeks a fee for services pursuant to Section 28(b) of the Act. Mr. Karatinos has submitted his affidavit which shows in total 84 hours, including 6 hours at the hearing held on April 2, 1974. Mr. Karatinos evidenced extensive and thorough preparation for the hearing; his brief was of the highest professional quality; and, in all respects, I find the hours spent to

be reasonable, the total fee sought, $3,420.00, reasonable and fully warranted pursuant to the considerations set forth in Section 28(b) of the Act.

Edward J. Haniver, counsel for Employer-Carrier, submitted an affidavit in response to the affidavit of Mr. Karatinos. Mr. Haniver, if I correctly understand his affidavit, asserts that the original determination of death benefits was correct and, therefore, no attorney's fee may be awarded under Section 28(b) because, he asserts, there would be no difference between the award and the amount tendered or paid. Mr. Haniver did not challenge the reasonableness of the time involved or the amount of the fee and concedes that,

> If the claimant's attorney ultimately succeeds * * * a reasonable fee should be awarded to him which might properly be assessible in part against the employer and carrier. (Affidavit of Edward J. Haniver, dated 29 April 1974, p. 2).

The late Associate Solicitor, James G. Johnston, by letter dated May 7, 1974, addressed to Mr. Karatinos, with a copy to the undersigned and to Mr. Haniver, stated, in part, as follows:

> We have received a copy of your petition for attorney's fees in the above case and would refer you to the War Hazards Compensation Act, as amended, 42 U.S.C. 1701 *et seq.*, and the United States Code provisions relevant to activities of employees in claims against and other matters affecting the Government, 18 U.S.C. 203, 205.
>
> Section 104(a)(3) of the War Hazards Compensation Act provides that an employee or insurance carrier required to pay benefits pursuant to the Defense Base Act may be reimbursed for that amount, plus "reasonable and necessary claims expense in connection therewith" by the United States Government out of the Federal Employees' Compensation Act funds. If the insurance carrier requests such reimbursement for your fees, provided your clients prevail in the above litigation, you will be receiving fees for services rendered in other than an employee capacity from the Government.
>
> * * * * *
>
> While I do not intend to object to your request for attorney's fees at this time, I thought you should at least be aware of the various statutory provisions relevant to your claim.

The Assistant Solicitor quite correctly set forth the portion of Section 104(a)(3) of the War Hazards Compensation Act relating to reimbursement of "reasonable and necessary claims expense"; but whether an attorney's fee incurred in resisting a claim for which said person is determined to have been liable is a reasonable and necessary claims expense is at least questionable. Section 104(a)(3) provides, in part, that "such employer, carrier, or fund shall be entitled to be *reimbursed for all benefits so paid or payable*, including funeral and burial expenses, medical, hospital, or other similar costs for treatment and care; *and reasonable and necessary claims expense in connection therewith* * * *." This language, literally, provides for reimbursement for benefits paid or payable and reasonable and necessary claims expense—not attorney's fees incurred in avoidance of a valid claim. *Cf. Suderman Stevedores, Inc., et al.* v. *Seab Sanders,* BRB No. 122–73 (1973).

In addition, Section 104(b) of the War Hazards Compensation Act further provides:

> (b) No reimbursement shall be made under this Act in any case in which the Secretary finds that the benefits paid or payable were on account of injury, detention, or death which arose from a war-risk hazard for which a premium (which included an additional charge or loading for such hazard) was charged.

The record shows that a policy of insurance for workman's compensation was issued; that the address of the employer was 21 Huynh-Tinh-Cua St. Saigon; and correspondence states that the annual premium on Employee's policy was in excess of $1,800,000. Whether the premium charged included an additional charge or loading is a determination to be made by the Secretary; however, the location of the Employer together with apparent premium paid suggest that the premium paid may have included an additional charge or loading for the hazard insured.

The provisions of Title 18 United States Code §§ 203 and 205 do not apply, as the Assistant Secretary very correctly noted, when the officer or employee, with or without compensation is acting,

> as agent or attorney for his parents, spouse child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary * * *

Mr. Karatinos is employed by the National Labor Relations Board and had no personal participation as a Government employee in the matter involved. Only if the Secretary of Labor determines that reimbursement is not prohibited by Section 104(b) and that reimbursement is permitted by Section 104(a)(3) of the

War Hazards Compensation Act do the provisions of Title 18 come into play. Mr. Karatinos is acting as attorney for his sister-in-law; however, if the provisions of Title 18 apply, the services may, nevertheless, be exempt as services for a person for whom, or for any estate for which, Mr. Karatinos is serving as guardian, executor, administrator, trustee, or other personal fiduciary. There are neither sufficient facts in the present record to determine whether any such exemption might apply nor is this the appropriate forum to make such a determination.

I conclude merely that services have been performed for which a fee of $3,420.00 is reasonable and appropriate within the meaning of Section 28(b) of the Act; and that the award of a fee for legal services pursuant to Section 28(b) of the Act to an employee of the Government authorized by his agency to perform the services involved would not contravene public policy since no determination has been made that Employer-Carrier would be entitled to reimbursement for any attorney's fee paid hereunder and since, even if reimbursement were allowed, the services, and fee therefor, may be exempt in accordance with the provisions of 18 U.S.C. § 205. Moreover, the Benefits Review Board, in *Griffin Baker* v. *New Orleans Stevedoring Company, et al.,* BRB No. 74–124 (1974), has admonished that an award of attorney's fee is mandatory under Section 28(b) of the Act. Obviously, the Benefits Review Board did not intend by its statement in *Griffin Baker, supra,* to require the payment of an attorney's fee if such payment would violate the provisions of Title 18 even though it recognized that the mandatory language of Section 28(b) of the Act requires the award of an attorney's fee where a claim under the Act has been successfully prosecuted. A proper accommodation of the requirement of Section

28(b) of the Act and the equally salutary provisions of 18 U.S.C. § 203 and 205 can be achieved by an award of an attorney's fee subject, however, to the provision that payment of such fee shall be conditioned on: a) determination by the Secretary of Labor of any claim for reimbursement of the attorney's fee approved hereby; and b) if reimbursement of such attorney's fee is allowed by the Secretary of Labor, determination by appropriate authority whether the payment or receipt of such fee is permitted under 18 U.S.C. § 205.

GENEVIEVE O. RASMUSSEN
WIDOW OF WILLIAM C. RASMUSSEN,
DECEASED
WILLIAM C. RASMUSSEN, JR.
SURVIVING CHILD

ORDER

A. Geocontrol, Inc. and its insurance carrier, New Hampshire Insurance Company, shall forthwith pay to Mrs. Genevieve O. Rasmussen, surviving widow of Employee William C. Rasmussen, deceased, weekly death benefits subject, however, to the provisions of Section 9(b) of the Act, as amended, 33 U.S.C. § 909 (b), as amended, as follows:[9]

i) Beginning May 11, 1973, and thereafter during widowhood; 50% of the deceased Em-

[9] No provision is made in this Order for the payment of funeral expenses for the reason that the insurance Carrier has represented (ALJ Exh. 3–B) that funeral benefits in the full statutory amount of $1,000.00 have already been paid.

ployee's average weekly wage of $798.00 per week, or $399.00 per week.[10]

ii) Beginning October 1, 1973, and each October 1st thereafter, the weekly benefit determined in subparagraph i), above, shall be adjusted pursuant to Section 10(f) of the Act, as amended, 33 U.S.C. §910(f), as amended.

iii) In addition to the payment set forth in subparagraphs i) and ii), above, legal interest at the rate of 6% per annum on each weekly installment as it became due from May 11, 1973, to the date of payment pursuant to this Order, shall be paid.

B. Geocontrol, Inc. and its insurance carrier, New Hampshire Insurance Company, shall forthwith pay to William C. Rasmussen, Jr., surviving child of Employee William C. Rasmussen, deceased, weekly death benefits as follows:

i) Beginning May 11, 1973, and thereafter until October 17, 1978, his 23rd birthday, unless his status as a student, as defined in Section 2(18) of the Act, as amended, 33 U.S.C. § 902 (18), as amended, shall sooner terminate, 16⅔% of the deceased Employee's average weekly wages of $798.00 per week, or $133.00 per week.

ii) Beginning October 1, 1973, and each October 1st thereafter, the weekly benefit determined in subparagraph i), above, shall be ad-

[10] All computations provided for in this Order shall be made by the Deputy Commissioner and any computation shown herein shall be for purposes of illustration only and subject to verification and correction by the Deputy Commissioner.

justed pursuant to Section 10(f) of the Act, as amended, 33 U.S.C. § 910(f), as amended.

iii) In addition to the payments set forth in subparagraphs i) and ii), above, legal interest at the rate of 6% per annum on each weekly installment as it became due from May 11, 1973, to the date of payment pursuant to this Order, shall be paid.

C. Weekly death benefits previously paid Widow and/or Son by Employer-Carrier shall be credited against the sums due and payable as set forth in Paragraphs A and B, above.

D. The insurance carrier, New Hampshire Insurance Company, alone, shall pay forthwith the following sum as a penalty, pursuant to Section 14(e) of the Act, as amended, 33 U.S.C. § 914(e), as amended, for failure to pay from October 17, 1973, until April 15, 1974, the installment of compensation payable without an award:

i) 10 percent of the difference between the amount paid from and after October 17, 1973, to April 15, 1974 ($133.00 per week as adjusted pursuant to Section 10(f) of the Act, as amended) and the amount due without an award ($178.00 per week as adjusted pursuant to Section 10(f) of the Act).

E. In additional to the payment set forth in Paragraph D, above, the insurance carrier, New Hampshire Insurance Company, alone, shall pay forthwith legal interest at the rate of 6% per annum on the difference between the amount paid from and after October 17, 1973, to April 15, 1974, and the amount due without an award (but not including the amount of any penalty) on each weekly installment as it became due from October 17, 1973, to April 15, 1974,

the date of payment of the amount due without an award.

F. Geocontrol, Inc. and its insurance Carrier, New Hampshire Insurance Company, shall pay to: Nicholas E. Karatinos, Esquire, 16102 Pond Meadow Lane, Bowie, Maryland 20715, the sum of $3,420.00 as a reasonable attorney's fee, pursuant to Section 28(b) of the Act, as amended, 33 U.S.C. § 928(b), as amended. Payment of the foregoing fee for legal services shall be subject to the following express conditions:

i) Payment shall be deferred until the Secretary of Labor shall have determined, if Employer or Carrier applies for reimbursement pursuant to the provisions of the War Hazard Compensation Act, whether the attorney's fee approved herein is subject to reimbursement.

ii) If the Employer or Carrier does not apply for reimbursement of the attorney's fee approved herein, or if the Secretary of Labor shall deny reimbursement of the attorney's fee, then, in either event, the fee shall be paid forthwith.

iii) If the Secretary of Labor shall determine that the attorney's fee approved herein is subject to reimbursement pursuant to the War Hazards Compensation Act, then payment shall be further held in abeyance pending determination by appropriate authority that payment and receipt of the attorney's fee approved herein is permitted by the provisions of 18 U.S.C. § 205. If it should be determined that payment and receipt of said fee is permitted, then payment shall forthwith be made. If it should be determined by appropriate authority that payment of the fee approved herein would not be permitted under 18 U.S.C. 205, then

the obligation of Employer and Carrier to pay any fee for legal services to Nicholas E. Karatinos shall forthwith terminate.

iv) Nothing contained herein shall prevent the obtaining of a determination by appropriate authority under 18 U.S.C. § 205 at any time, whether or not any application for reimbursement has been made and/or determined, and if a determination by appropriate authority is obtained that payment and receipt of the fee approved herein would be permitted under 18 U.S.C. § 205, then the fee approved herein shall forthwith be paid.

WILLIAM B. DEVANEY,
Administrative Law Judge.

Dated: October 24, 1974, Washington, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1978